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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1946.

## No. 467

**AYRSHIRE COLLIERIES CORPORATION,**
**a corporation, et al.,**
Appellants,

vs.

**UNITED STATES OF AMERICA, et al.,**
Appellees.

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,**
Appellant,

vs.

**UNITED STATES OF AMERICA, et al.,**
Appellees.

**Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.**

## BRIEF FOR

**The Alton Railroad Company (Henry A. Gardner, Trustee), et al., Railroad Appellees,**

**and**

**Central Illinois District Coal Traffic Bureau and Illinois Coal Traffic Bureau, Appellees.**

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## Opinions Below.

The specially constituted District Court filed no opinion. Its Findings of Fact, Conclusions of Law, and Judgment appear at R. 108-111. The report of the Interstate Commerce Commission (R. 164-222), *Coal to Beloit, Wis., and Northern Illinois*, appears in 263 I. C. C. 179.

## Jurisdiction.

The decree of the District Court was entered on June 5, 1946 (R. 111). The petition for appeal was filed on July 30, 1946 (R. 112-113) and was allowed on August 1, 1946 (R. 119-120). This Court's jurisdiction rests upon the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 220, 28 U. S. C., sec. 47a), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C. sec. 345). Probable jurisdiction was noted on October 21, 1946 (R. 1675).

## Statutes Involved.

The statutory provisions involved are Sections 1 (5) (a), 2, 3(1), 4(1), 13(3), 13(4), 15(1), 15(7), and 15a(2) of the Interstate Commerce Act (49 U. S. C.), which are set out in the Appendix to this brief.

## Statement of the Case.

This is a direct appeal from a final decree of a specially-constituted District Court for the Southern District of Indiana dismissing two complaints seeking to enjoin an order entered by the Interstate Commerce Commission on July 9, 1945, in a proceeding styled Investigation and Suspension Docket No. 5139, *Coal to*

*Beloit, Wis., and Northern Illinois,* reported in 263 I. C. C. 179. The Commission's order prescribed certain rates and rate relationships on bituminous coal transported by railroad from mines in Indiana and western Kentucky to Beloit, Wisconsin, and certain destinations in northern Illinois. These appellees take the position that the Commission's order is valid and that the decree of the specially-constituted District Court should be affirmed.

A short historical background is necessary to an understanding of the issues in this case. Bituminous coal is mined in great quantities in Illinois, Indiana, and western Kentucky. This great coal field is known as the midwestern field. A natural market for this coal is the territory north and west of the coal field, including the states of Illinois, Iowa, and Wisconsin, and great quantities of coal move to destinations in those states.

Freight rates have, of course, been in effect for many years on coal moving from the mines in this coal field to destinations in the Northwest. Coal rates in the United States have never been based strictly on distance. Competition among coal producers is so keen as to require in the common interest a blanketing or grouping of rates whereby all mines in a particular area or group —often of wide extent—are accorded the same rate when shipping to the same destination. This universal characteristic of coal rate structures obtains with respect to the rates on coal moving from this midwestern coal field to northern Illinois, Iowa, and Wisconsin. The mines in Illinois, Indiana, and western Kentucky have, in other words, long been divided into groups for rate making purposes. These groups are shown on the map which was introduced as Exhibit No. 1 in the proceeding before the Commission (R. 486-A). For convenience, this map has been inserted at the back of this brief.

A necessary concomitant of group rate adjustments is that of rate differentials, or differences in the rates applying from the respective groups in the adjustment. These differentials are usually constructed with reference to a particular base group. The southern Illinois group, the southernmost group in Illinois, has long been the base group as far as the Illinois rate groups are concerned, the rates from all other Illinois groups being made a certain "differential," expressed in cents per ton, under the rates from the southern Illinois group. In recent cases, however, the Commission, in prescribing rates on coal in this general territory, has used the important Fulton-Peoria group in northwestern Illinois as the base group (R. 170). The rates from the western Kentucky group are made a certain "differential" higher than the rates from southern Illinois. In Indiana, Brazil-Clinton, the most northerly group in the State, is the base group, the other Indiana groups being made certain "differentials" over Brazil-Clinton (R. 169).

The rates on coal from these origin rate groups in the midwestern field, with the exception shortly to be mentioned, are, of course, interstate rates and as such are subject to the regulatory power of the Interstate Commerce Commission. However, an important part of this northwest destination territory is that portion lying within the State of Illinois north of the coal fields, including Rockford, Freeport, Dixon, Geneva, and the greatest coal market in the country, Chicago. To these destinations in northern Illinois, the rates from the coal mines in Illinois are for the most part intrastate rates and are subject to regulation by the Illinois Commerce Commission. The existence of this exception to the regulatory jurisdiction of the Interstate Commerce Commission has meant disharmony and maladjustment between the interstate coal rates in this territory and the intrastate rates in Illinois, and has resulted in inter-

mittent litigation concerning these rates before both the Interstate and Illinois Commerce Commissions.

In 1925, reductions were made by the carriers in the rates on coal from the Indiana groups to a number of destinations in northern Illinois, including Rockford, Freeport and Dixon. Since the carriers made no comparable reductions from Illinois groups, the Illinois Commerce Commission, in 1930, required the railroads to make substantial reductions in their intrastate rates on coal from origin groups in Illinois to the same destinations. The carriers thereupon filed a petition with the Interstate Commerce Commission asking that Commission to institute an investigation into the intrastate rates on coal within Illinois, under Section 13 of the Interstate Commerce Act, with a view to entering an order requiring the restoration of the intrastate rates as they were before the Illinois Commerce Commission had required them to be reduced. The Interstate Commerce Commission did institute such an investigation, but in its decision (*Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, decided March 8, 1932) declined to require this particular increase sought by the carriers. The Commission agreed that the intrastate rates to this northern Illinois territory were well below the level of the interstate rates in effect to southern Wisconsin and eastern Iowa, but found that the interstate rates from the Indiana groups to northern Illinois were so low that it would be improper for it to require an increase in the intrastate rates from the Illinois mines unless and until the rates from the Indiana groups to those same northern Illinois destinations were also increased to a level more nearly commensurate with the general level of interstate rates in this territory.

With the failure of the carriers to effect a restoration of the previous intrastate rates to northern Illinois,

attention must be turned to Indiana. One of the lines serving mines in Indiana, the Chicago, Milwaukee, St. Paul and Pacific Railroad, also serves a number of these destinations in northern Illinois where reductions had been required by the Illinois Commission, and that line thereupon, in 1932, filed individual tariffs with the Interstate Commerce Commission proposing to make reductions in its own interstate rates, *i. e.*, applying over its single-line routes, from the two Indiana groups it serves, Brazil-Clinton and Linton-Sullivan, to the northern Illinois destinations it serves, comparable to the reductions which had been made to those destinations in the intrastate rates from Illinois mines. These proposed reductions in the Milwaukee's rates were suspended by the Interstate Commerce Commission and after hearing were ordered canceled. *Coal from Indiana to Illinois*, 197 I. C. C. 245, 200 I. C. C. 609. The Commission's order, however, was held invalid by this Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, among other reasons because it was not supported by adequate findings of fact. The Court indicated the Commission should "fix the fair relation between one line and another and * * * build the structure of the rates accordingly." (Pp. 509-510.)

Thereupon, in 1934 rates became effective from the Brazil-Clinton and Linton-Sullivan groups in Indiana to some destinations in northern Illinois, which were lower via the single-line routes of the Milwaukee Railroad than via joint-line routes from those groups to those destinations. This is a most important fact in connection with the instant case. In 1936, the Illinois Central Railroad Company met the action of the Milwaukee as far as it could by reducing its single-line rates from the Linton-Sullivan group, the only Indiana group it reaches, to the northern Illinois destinations it serves, to the same basis as ap-

plied via the Milwaukee's single-line routes. Higher rates were therefore left in effect over joint-line routes.

This rate adjustment, under which lower rates obtained over single-line routes of the Milwaukee and of the Illinois Central, from the two Indiana groups mentioned, than over joint-line routes, is usually referred to as the "dual basis of rates." It is around this dual basis of rates that much of the controversy in the instant case revolves.

It is now necessary to explain the immediate cause of the present proceeding before the Interstate Commerce Commission, whose order in this proceeding is here under attack. Suffice it to say that in a formal complaint proceeding, *Fairbanks-Morse & Co.* v. *Alton & S. R.*, 251 I. C. C. 181, decided March 3, 1942, the Interstate Commerce Commission found that the difference between the rates on bituminous coal from these origin groups to Rockford, and the rates to Beloit, was too great, that it unduly preferred Rockford and unduly prejudiced Beloit, and that the spread in the rates, then 30 cents in most instances, should not exceed 15 cents. By its order the Commission gave the carriers the alternative of reducing their rates to Beloit or of increasing their rates to Rockford. The carriers felt that reductions in the rates to Beloit would be apt to spread to other destinations in Wisconsin, and for that and other reasons they concluded to comply with the order in the *Fairbanks-Morse* case by making increases in the rates to Rockford. This action had also the merit, from the carriers' standpoint, of restoring the rates to this "low-spot" destination territory in northern Illinois, to a level more nearly commensurate with the general level of interstate rates in this territory.

Therefore the carriers filed schedules with the Illinois and Interstate Commerce Commissions, proposing increas-

ed rates to Rockford and other destinations in northern Illinois related to Rockford. These schedules were protested by various parties, including the appellant Indiana coal shipping interests (R. 131-141), and were suspended by both commissions.* (R. 141-144, 157-159). The principal railroads operating in Illinois thereupon filed a petition with the Interstate Commerce Commission, alleging that the existing intrastate rates on coal from Illinois mine groups to northern Illinois violated Section 13 of the Interstate Commerce Act, and asking that Commission to institute an investigation into the lawfulness of those rates with a view to entering an order requiring those intrastate rates to be increased (R. 145-159). The Interstate Commission did institute such investigation.** (R. 159-161). The interstate suspension proceeding (I. & S. Docket No. 5139) and the 13th section proceeding (No. 28881) were subsequently heard on a consolidated record with the Illinois Commerce Commission suspension proceeding, under the cooperative plan agreed upon between the two commissions. The testimony taken at the hearings ran to 2857 pages, and 118 exhibits were received, many being extremely voluminous (R. 226-1613, 1675-1700).

In a decision dated July 9, 1945, covering both proceedings, the Interstate Commerce Commission found in No. 28881 that the existing intrastate rates, with certain stated exceptions not here relevant, were so low as to cause unjust discrimination against interstate commerce in violation of the provisions of Section 13 of the Interstate Commerce Act. The Commission indicated in its report the extent to which the intrastate rates should be increased in order to remove the violations of Section 13, but said:

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* Ill. C. C. Docket No. 30935 and I. C. C. Investigation and Suspension Docket No. 5139.

** I. C. C. Docket No. 28881.

> "In accordance with our practice in section 13 proceedings, we shall leave to respondents and the Illinois commission the matter of adjusting the intrastate rates to conform to our findings and conclusions herein under that section. If this is not accomplished within 60 days from the service of this report, consideration will be given to the entry of an appropriate section 13 order." (R. 212.)

In I. & S. Docket 5139, the Commission issued the order which is attacked in this proceeding (R. 222). In proposing increases in the rates from mines in the midwestern field to destinations in northern Illinois, the carriers did not propose to alter the situation whereby the Milwaukee and Illinois Central would have lower rates over their direct single-line routes from the Brazil and Linton groups in Indiana than via joint line routes from those groups. In other words, the carriers did not propose to do away with the so-called dual basis of rates (R. 177).

In its report, however, after a thorough discussion of the question, the Commission found that the dual basis of rates resulted in unjust discrimination in violation of Section 2 and in undue preference and prejudice in violation of Section 3 of the Interstate Commerce Act (R. 175-184). The Commission then proceeded to a painstaking consideration of the rate relations between the origin groups in Indiana (R. 184-187), and the level of the rates from Indiana with respect to the rates from Illinois (R. 188-192). It found that the present and proposed interstate rates from Indiana groups were unreasonable to the extent they exceeded the rates set forth in the report, and unjustly discriminatory and unduly preferential and prejudicial to the extent they reflected rate relations different from those reflected by the rates prescribed in the report (R. 210-211). The carriers were ordered—

> "* * * (1) to cease and desist from practicing the unjust discrimination under section 2 of the Interstate Commerce Act and the undue prejudice and preference under section 3(1) of said act, found in said report to exist, and (2) to publish, maintain, and apply rates and charges which will avoid and remove the said unjust discrimination and undue prejudice and preference." (R. 222.)

To repeat, it is this order (R. 222) which appellants here seek to enjoin.

The reason that appellants, whose interests lie in Indiana, seek to enjoin this order is primarily because the rates which the Commission prescribed from the Brazil and Linton groups in Indiana are higher in relation to the rates from Illinois groups than were the former single-line rates of the Milwaukee, over which the great preponderance of the coal moved from those Indiana groups. The reason these appellees seek to sustain the Commission's order is primarily because the Commission has now required a revision of this entire rate structure in accordance with the statement of this Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, and has eliminated the so-called dual basis of rates from the two Indiana groups referred to, to the original establishment of which dual basis of rates appellees were opposed.

Returning now to the Commission's decision in the 13th section case, No. 28881: No order was entered by the Illinois Commission within the 60-day period specified in the Interstate Commission's report, and therefore on November 13, 1945, the Interstate Commerce Commission entered an order in No. 28881 under Section 13 of the Interstate Commerce Act, reading in part as follows:

> "*It is ordered*, That respondents in this proceeding, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, * * * from practicing the unjust

discrimination against interstate commerce found in said report to exist.

"*It is further ordered*, That said respondents, according as they participate in the transportation, be, and they are hereby notified and required to establish, * * * and hereafter to maintain and apply for the intrastate transportation of bituminous coal, in carloads, from Victoria and Rushville, Ill., and from the Fulton-Peoria and Danville groups and other Illinois groups south thereof to northern Illinois destinations to which intrastate rates from the foregoing points or groups are proposed to be increased in schedules enumerated in Appendix E to said report, rates which shall be no lower than the approved rates or on the rate bases as indicated in said report, including appendices A and D thereof; * * *."

Also on November 13, 1945, the Commission entered an order denying the petitions for reopening, reconsideration, rehearing, etc., that had been filed with it by the Coal Trade Association of Indiana and the Milwaukee Railroad, appellants here, and three chambers of commerce, and postponed the effective date of its order of July 9, 1945, in I. & S. Docket No. 5139 to January 21, 1946, making it correspond with the effective date of the order in the 13th section case, No. 28881 (R. 223-224). On December 6, 1945, the effective date of these two orders was further postponed to February 8, 1946 (R. 224-225).

On December 21, 1945, Ayrshire Collieries Corporation, and others, representing coal mining interests in Indiana, filed a petition in the court below seeking to enjoin the Commission's order of July 9, 1945, in I. & S. Docket No. 5139 (R. 1-40). On December 27, 1945, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company filed with the same court a petition seeking similar relief (R. 41-49). These two suits were consolidated by the District Court (R. 54).

The appellees upon whose behalf this brief is filed intervened as defendants in the suits in the District Court (R. 70-76, 87-93). The Commission postponed the effective date of its orders in No. 28881 and I. & S. Docket No. 5139 from time to time until the District Court could be assembled and render a decision (R. 223-225, 1663-1666).

On April 22, 1946, hearing on the applications for a permanent injunction was held before the specially-constituted District Court, at which plaintiffs below introduced certified copies of the record, transcript, briefs and other pleadings in the proceeding before the Interstate Commerce Commission (R. 107).

On June 5, 1946, Circuit Judge Major and District Judge Igoe made their findings of fact and conclusions of law, holding that the Commission's order was supported by substantial evidence, was free from any error of law, and was valid, and entered a decree dismissing the complaints (R. 108-111). Circuit Judge Evans was unable to participate in the decision because of illness (R. 108). Appellants filed no motion questioning the authority of two judges of the three-judge court to render a decree, or seeking the convening of a new three-judge court to rehear the case. On July 23, 1946, rates published to comply with the Commission's orders became effective.

Appeals from the District Court's final decree were duly taken by the petitioners below (R. 112-123). On August 19, 1946, the United States and the Interstate Commerce Commission filed a motion to affirm, to which appellants on September 5, 1946, replied. The appeals were docketed in this Court September 6, 1946, and probable jurisdiction was noted on October 21, 1946 (R. 1675).

## SUMMARY OF ARGUMENT.

### I.

(Pages 20 to 24)

By the order here under attack the Commission held it was unlawful for the railroads to maintain from mines on the Milwaukee Railroad lower rates via the single-line routes of the Milwaukee than apply from mines in the same group not on the Milwaukee but in which the Milwaukee joins.

The Commission forbade the establishment of this so-called dual basis of rates in 1934, but this Court held the Commission's order invalid in *United States* v. *Chicago, M., St. P. & P. R. R. Co.*, 294 U. S. 499. The dual basis thus thereafter did become effective. *The order of the Commission presently assailed, again finding the dual basis of rates unlawful, is predicated on a complete record and is precisely along the lines which the Court in that case indicated the Commission should have proceeded.* The Court pointed out that "the whole situation is subject to the power of the Commission" in that it "may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly." (Pp. 509-10). *This the Commission has now done.*

Appellants, on the other hand, contend the Court's prior decision means that the dual basis of rates is lawful, and they argue from that that the Commission cannot now hold it unlawful. The Commission's 1934 order was based on violations of Sections 1(5) and 15a(2) of the Act, and the Court held the order invalid for lack of sufficient findings and for lack of substantial evidence.

The order presently under attack, however, is based on violations of Sections 2 and 3(1), and is supported both by adequate findings and substantial evidence.

The Court's prior decision attests the validity rather than the invalidity of the order here in issue.

## II.

(Pages 24 to 37)

(A) The Commission found that not only the rates under suspension were unlawful under the Interstate Commerce Act, *but also the existing rates*, and proceeded to prescribe for the future rates and relationships differing from the existing as well as from the suspended rates and relationships. Appellants contend the Commission's order is invalid (1) because the Commission lacked jurisdiction to require any change in the existing rates, being limited to passing upon the lawfulness of the rates proposed, and (2) because appellants had no notice that the lawfulness of the present rates was in issue and had no opportunity to be heard on that issue.

These appellees contend on the contrary that Section 15(1) and (7) of the Interstate Commerce Act expressly bestows jurisdiction on the Commission in an investigation and suspension proceeding to prescribe either the maximum or the minimum or the exact rate which shall be established and observed in the future, regardless of whether that rate differs in any wise from the existing rate. This Court has in the past upheld the Commission's issuance of an order on all fours, in this respect, with the order here complained of. A three-judge federal court has expressly held that the Commission has jurisdiction to issue such orders. And the Interstate Commerce Commission has not only often declared it has the power to issue such orders but has in fact issued many of them.

Such being so, the Commission's notice of investigation into the lawfulness of the suspended rates constituted ample notice that the Commission could and might prescribe for the future rates which differed from the suspended rates and which might very well differ also from the rates already existing and in effect. In fact, before the Commission appellants repeatedly stated that the lawfulness of the existing rates was an issue in the case. They should not now be heard to deny that they had notice that prescription of rates different from the existing rates was a possible outcome of the proceeding.

(B) Appellants contend that the Commission's order, insofar as it required a change in the rates to Beloit, Wisconsin, from the Princeton and Boonville groups via the Southern Railway, and from the Brazil-Clinton and Linton-Sullivan groups via the single-line routes of the Milwaukee Railroad, is invalid. They contend that since the tariffs under suspension and investigation proposed no changes in such rates, the Commission lacked jurisdiction to require such rates to be changed.

By its order of investigation, however, the Commission instituted an investigation into the lawfulness of the rates stated in the suspended tariffs. The single-line rates of the Milwaukee Railroad to Beloit were stated in those tariffs, and thus came within the scope of the investigation even though such rates did not represent any change from the existing rates via the Milwaukee's single-line routes. The Commission had jurisdiction under Section 15(1) and (7) to investigate and make the order it did with respect to the Milwaukee's single-line rates to Beloit.

On the other hand, rates via the Southern Railway from the Princeton and Boonville groups to Beloit were not contained in the tariffs under investigation, and ap-

pellants are correct in contending that the Commission therefore had no jurisdiction to require changes in the Southern's existing rates to Beloit. But appellants' argument that the order under attack is consequently invalid is untenable for the simple reason that the Commission did not make any order with respect to those rates.

## III.

(Pages 37 to 53).

The Commission found that shippers on the Milwaukee Railroad were unjustly preferred by that railroad's affording them single-line rates lower than the rates accorded other shippers in the same group but not on the Milwaukee, and that the latter shippers were in turn unduly prejudiced and unjustly discriminated against because their rates—which were joint rates and in many of which the Milwaukee joined—were higher than the rates maintained by the Milwaukee for shippers on its line. Further, shippers in other groups were unduly prejudiced by the excessively wide spread between their rates and the low single-line rates accorded by the Milwaukee to shippers on its own line. The Commission found that unjust discrimination in violation of Section 2 and undue preference and prejudice in violation of Section 3(1) existed because of this rate situation.

(A) Appellants contend the Section 2 finding is invalid because, they say, Section 2 only forbids unequal charges to shippers who ship *from the same origin point over the same route* to the same destination, a situation which does not obtain here. That contention is unsound, for when a number of origin points have been gathered together into one rate group for rate making purposes, as is the case here, Section 2 enforces equality as between *all shippers in that rate group.*

(B) Appellants contend the Sections 2 and 3(1) findings are invalid because they are arbitrary and not supported by substantial evidence. They say that the only evidence to support these holdings is "the fact of the measure of such rates and the distances over which such rates applied to various destinations." That is incorrect. As the Commission's report shows, the Commission considered among other things, the total tonnage moving from these origin groups in Indiana to the destinations involved. It observed that the vast preponderance of the traffic was transported under the lower rates of the Milwaukee Railroad. It observed that the transportation conditions obtaining over the single-line routes of the Milwaukee did not differ materially from the conditions obtaining over other routes, and that there was no important difference in the average distances over the various routes. The Commission also observed that all the Indiana mines involved produced about the same quality and grade of coal and that "a difference of a few cents per ton in the transportation charge is normally sufficient to divert a coal contract from one mine to another." The decision of this Court in *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, shows that the evidence on which the Commission acted in this case is sufficient to support its findings of violations of Sections 2 and 3(1). Further, in the proceedings before the Commission, appellants recognized that the record was adequate to support an order adjusting the relationships and level of the rates in issue.

(C) Contrary to appellants' contention, the Commission's order is supported by proper and adequate findings of fact. The thorough and painstaking consideration which is evident from the Commission's report goes far towards refuting appellants' contention that the report and order are arbitrary.

## IV.

(Pages 53 to 60).

Appellants contend the Commission's findings and order are invalid because, they say, the Milwaukee Railroad has no effective control over the joint line rates from the Indiana groups. That argument is unsound for three reasons: (A) The order is an order prescribing rates under Section 15 of the Interstate Commerce Act, and since the power to prescribe specific rates is explicitly applicable to cases of undue prejudice, this Court has held that a preferential or prejudicial rate can be eliminated by the Commission's prescribing the specific rates without allowing a carrier any choice of alternatives, and hence without the necessity of a finding that the railroad controls both rates; (B) the order runs against the rates of all railroads participating in the adjustment—not just the rates of the Milwaukee—, and these railroads constitute a group of railroads which effectively control the rates found unlawful and which are the common source of the undue preference and prejudice found to permeate the entire rate structure; (C) the absence or existence of effective participation in and control over these rates is a question of fact entrusted to the Commission which the Commission has determined contrary to appellants' contention; this determination by the Commission should not be impugned by the Court.

## V.

(Pages 60 to 72).

Appellants contend that in determining upon the rates and relationships which the Commission prescribed for the future, the Commission was guilty of arbitrary and capricious action. This argument is unsound. The Commission's report shows the painstaking, logical and thor-

ough consideration which went into the prescribing of those rates. The Commission considered, among other things, mileage, transportation conditions, competitive conditions, production figures, volume of movement, the level of the rates, comparative relationships and group differentials. Its order is based on substantial evidence and should be upheld by this Court.

Appellants criticize the order on the alleged ground that the Commission based the prescribed rates to individual destinations only on the basis of the average of the rates to representative destinations, and they criticize the rates and relationships prescribed because they do not, in appellants' opinion, sufficiently reflect the factor of distance. Appellants thus would have the Court substitute its judgment for that of the Commission on intricate questions of rate making, which the Court has consistently held it will not do.

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The Commission had jurisdiction to make the order under attack, the order is supported by substantial evidence and adequate findings of fact and is in every respect valid. This Court should affirm the decree of the lower court dismissing the complaints.

## ARGUMENT.

### I.

### By Its Order the Commission Has Done What This Court Has Said It Had the Power to Do and Should Do With Respect to This Very Rate Adjustment.

A portion of this same rate adjustment was before this Court in 1935, in *United States* v. *Chicago, M., St. P. & P. R. R. Co.*, 294 U. S. 499, and in its decision the Court said the Interstate Commerce Commission has the power, and clearly intimated it should exercise the power on a comprehensive record such as it had in the instant proceeding, to enter the very kind of order which it has entered and which is now under attack.

Earlier in this brief, on page 6, there was described how the Milwaukee Railroad, in 1932, filed tariffs reducing its single-line rates from Indiana groups to destinations in northern Illinois substantially below the level of the joint line rates. It will be recalled that the Commission suspended those tariffs and found the proposed reduced rates unlawful, but that this Court, in the case cited above, found the Commission's order invalid. The reduced single-line rates of the Milwaukee subsequently became effective. Such was the origin of the so-called dual basis of rates from Indiana.

Appellants now urge that the Court's opinion in that case has the effect of holding the dual basis of rates to be lawful and therefore forecloses the Commission from entering any order, such as the one now assailed, holding the dual basis unlawful. These appellees, on the other hand, submit that in that opinion the Court indicated clearly that the Commission has the power to enter this kind of order and that it in fact should have done so.

In the prior case the Court had before it a report of the Commission which had found that the reduced rates which the Milwaukee sought to establish (1) "would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act"; (2) would result in different rates from the same group to the same destinations, thus disrupting "the individual groups from which the rates are proposed"; and (3) "would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups." For these reasons the Commission held that the rates proposed would be unreasonable in violation of Sections 1(5) and 15a(2), and ordered them canceled. *Coal from Indiana to Illinois*, 200 I. C. C. 609, 621-2.

As stated, this Court held the Commission's order invalid in *United States* v. *Chicago, M., St. P. & P. R. R. Co.*, 294 U. S. 499. Since there was no finding by the Commission that the rates proposed were less than compensatory or that they were below the zone of reasonableness, the Court concluded that the holding of unreasonableness was based on the disruption which the Commission found would follow from the proposed rates becoming effective. The Court held that this finding of probable disruption, without more, was insufficient to support the holding of unreasonableness, for two reasons. *First*, the mere fact that disruption would follow was "no sufficient reason for prohibiting a change." (P. 507.) There was no indication that it would be "unjust or impracticable" for comparable reductions to be made by other lines, or that if such reduced rates were to be made

by other lines they would be "less than compensatory or that capacity for service to the public will be impaired or put in jeopardy." Reductions would not necessarily mean a diminution of profits, and even if they did result in a diminution of profits that would not by itself warrant prohibition of the change. The Commission's report lacked findings as to the extent of the impairment of revenues, or whether or not it would be substantial, "for only thus can the impairment be related to capacity for service." (P. 508.) The order was therefore invalid because it was not based on sufficient findings. *Second*, the danger of a disruption or breaking down of the rate structure was in fact non-existent and illusory, and the Court held that the holding of unreasonableness on account of that danger was therefore without support. The Court said that it was clearly within the Commission's power to prevent a breaking down of the rate structure:

> "The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds." (P. 509.)

The Court held that the Commission could conduct a comprehensive inquiry into the rates of all the carriers and:

> "may fix the fair relation between one line and another and may build the structure of the rates accordingly." (Pp. 509-510.)

The Court held that the Commission:

> "has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, • • • has not questioned its own capacity to prevent unjust reprisals, [and] has put off to an indefinite future the remodeling of the rate structure for all the carriers affected, • • •." (P. 510.)

For this reason, too, the Court held the Commission's order was invalid because there was not substantial evidence to support the finding of a danger of disruption upon which the holding of unreasonableness was based.

Appellants now contend that since the Commission has not found the Milwaukee's rates unreasonable, those rates may not, under this Court's prior decision, be held unlawful. That contention is unsound.[2] The Court said that rates within the zone of reasonableness must be upheld unless they are found to violate some section of the Interstate Commerce Act, and in this case the Commission has found that the rates in question do violate Sections 2 and 3 of that act.

The Court indicated in its prior decision that it might have upheld the Commission's order if the Commission had made definite findings that low single line rates via the Milwaukee Railroad would result in unfair rate relationships, or that such rates "would confirm Milwaukee in the enjoyment of an undue portion of the traffic." 294 U. S., at pp. 510-511. Such findings have now been made by the Commission, and the Court should find the order valid.

This Court has said nothing to require this Commission to forever maintain a hands-off policy with respect to the Milwaukee's rates. What the Court did hold was that the order of the Commission in *Coal from Indiana to Illinois*, 197 I. C. C. 245, 200 I. C. C. 609, where the Commission had found the proposed rates of the Milwaukee unreasonable, was in fact based on the finding that the proposed rates were unreasonable because they would disrupt and break down the existing rate structure with results which would be in the teeth of Section 15a(2). The Court held that the conclusion of unreasonableness (1) was not supported

by adequate findings that the feared disruption would so impair earnings or service as to involve Section 15a (2), and (2) was not supported by substantial evidence that there would be any disruption in the first place.

The findings and conclusions of the Commission in the instant proceeding are quite different from those dealt with by the Court in the case referred to. In fact, the Commission's order, based on findings of violations of Sections 2 and 3 of the act, is the result of what was said by this Court in the prior case. As the Commission observed in its report in the instant proceeding:

> "In *U. S.* v. *Chicago, M. St. P. & P. R. Co., supra,* the Supreme Court pointed out that we had 'not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates;' that 'the whole situation is subject to the power of the Commission,' in that we 'may fix the fair relation between one line and another, and may build the structure of the rates accordingly.'" (R. 184.)

The record being complete, the whole situation is subject to the power of the Comm' sion, and the Commission has, therefore, adjudged the relation between the Illinois and Indiana rates, has fixed the fair relation between those rates and between one line and the other, and has built the structure of the rates accordingly.

## II.

## The Commission Had Jurisdiction to Enter Its Order.

### (A) The Commission had jurisdiction to find the present rates and relationships unlawful and to require them to be changed.

In Conclusion No. 1 of its report, the Commission found that—

> "1. The present and the proposed rates from Indiana to the northern Illinois destinations * * * result or would result in [violation of Sections 2 and 3(1) of the Act]." (R. 210.)

By its order the Commission required that certain rates and relationships be established for the future.*

Appellants contend that the order is unlawful because it purports "to determine the lawfulness of the *present* rates from Indiana to destinations in Illinois, and to require the respondents to publish and maintain rates in the future on a certain basis for the purpose of curing the alleged unlawfulness of the *present* rates, an issue that was not before the Commission in this proceeding." (R. 9; Italics added.)

Appellants are wrong. That in an investigation and suspension proceeding the Commission has the power to find the present as well as the proposed rates unlawful and to require that rates different from either be established, is expressly provided for in the Interstate Commerce Act. This investigation in I. & S. Docket No. 5139 was instituted under the provisions of Section 15 (7) of the act, which, after bestowing the power of suspending schedules filed with the Commission, provides that the Commission may enter upon a hearing concerning the lawfulness of the suspended schedules, and provides further that—

> "After full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission *may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.*" (Italics added.)

The section of the act stating the kind of an order that the Commission can enter in a proceeding initiated

* The term "present rates," or "existing rates," as used in this brief means the rates which, because the increases the railroads proposed were suspended, continued in effect throughout the pendency of this case before the Commission. The rates and relationships prescribed by the Commission in the proceeding here involved were published and became effective July 23, 1946.

after schedules become effective, is Section 15(1), which reads as follows:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any * * * rate, * * * is or will be unjust or unreasonable *or unjustly discriminatory or unduly preferential or prejudicial*, or otherwise in violation of any of the provisions of this chapter, the Commission is hereby authorized and empowered *to determine and prescribe what will be the just and reasonable* * * * *rate* * * * *to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged*, * * * *and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist*, and shall not thereafter publish, demand, or collect any rate * * * for such transportation other than the rate * * * so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, * * *." (Italics added.)

Under these statutory provisions, the Commission could have let the proposed rates go into effect instead of suspending them, and could then, after the investigation and hearing, have proceeded to enter an order requiring the establishment of the very rates which it did in fact require in the order here attacked. In short, it is clear that the Commission acted within the scope of its power and jurisdiction in finding that the *present and proposed* rates result in unjust discrimination and undue preference and prejudice, and in requiring a changed relation between the rates although the suspended schedules do not propose a change in such relation.

In *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, this Court upheld an order of the Interstate Commerce Commission which, just like the order in the case at bar, found unlawful not only the rates under suspension but also the rates already in effect, and prescribed a new basis of rates for the future. That decision should be followed here.

Other court and Commission cases confirin the conclusion that the Commission here had authority to find the *present* rates unlawful and to prescribe rates for the future different from either the present or suspended rates. In *Akron, C. & Y. Ry. Co.* v. *United States*, 22 F. (2d) 199, a three-judge district court said (p. 203):

> "Section 15, par. 7, empowered the Commission to entertain proceeding No. 2440. After a full hearing, the Commission may make such order with reference to the proposed new rate as would be proper in a proceeding initiated after it had become effective. It was within the power of the Commission, if it found the rate attacked to be unreasonable, under section 15, par. 1, to require a reduction of that rate to a basis found to be reasonable. *Advances in Rates, Western Case*, 20 *Interst. Com. Com'n R.* 307. *It has power either to increase or decrease the then existing rates. Western Paper Makers' Chemical Co.* v. *U. S.*, 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941; *Mo. Pac. R. Co.* v. *Boone*, 270 U. S. 469, 46 S. Ct. 341, 70 L. Ed. 688; *Excelsior from St. Paul*, 36 Interst. Com. Com'n R. 349; *Naval Stores from Southern Points*, 87 Interst. Com. Com'n R. 740." (Italics added.)

In *Advances in Rates—Western Case*, 20 I. C. C. 307, 314, the Commission said:

> "The question before the Commission is that which would have arisen *had these rates gone into effect and a formal complaint been made against them as unjust and unreasonable.* We may establish the rates pro-

posed as reasonable, one or all of them, or reduce the proposed rates. We may continue in effect the present lower rates, *or we may reduce the existing rates.* For 'the Commission may make such order in reference to such rate * * * as would be proper in a proceeding initiated after the rate had become effective.'" (Italics added.)

In *Lignite Coal from North Dakota,* 126 I. C. C. 243, 244-5, the Commission said:

"Respecting the jurisdictional question, the position is taken that, in an investigation and suspension proceeding, the only issue before us is as to the lawfulness of the *suspended* schedules; that we are called upon either to condemn or approve the schedules; that we have no authority to approve a basis intermediate between the existing rates and the basis sought to be made effective; and that as the proposed schedules were not approved, *the finding that the present rates were too low was consequently 'irrelevant,' 'gratuitous,' and 'not binding on anyone.' But this view is wholly untenable and in conflict with specific provisions of the act and numerous decisions of the commission.* See *Advances in Rates—Western case,* 20 I. C. C. 307, at page 314; *Excelsior from St. Paul, Minn.,* 36 I. C. C. 349, at page 365; *Salt from Louisiana Mines to Chicago,* 69 I. C. C. 312, at page 313. Referring to paragraph (7) of section 15 of the act, it was stated in the case last referred to:

> 'By this provision we are given authority to determine the "lawfulness" of a "new" rate, whether it be increased or decreased. The duty of specifying in what respect and to what extent the new rate will be lawful or unlawful is not laid upon us, although we "may" make any order which would be proper in a proceeding pending upon complaint.'" (Italics added.)

In *Sioux City Term. Ry. Switching,* 241 I. C. C. 53, 73-4, the Commission said:

"On brief, complainants question our authority to deal with this situation in these proceedings. In an investigation and suspension proceeding we constantly take cognizance of violations of sections 1, 2, and 3 of the act, and there being placed before us the question of what rates, rules, regulations, or practices are lawful for the future, *we may require changes in the existing rates,* rules, regulations, and practices (*Lignite Coal from North Dakota,* 89 I. C. C. 726); and we have authority to make such order with reference to the matters under investigation as would be proper in a proceeding initiated after the proposed schedules go into effect (section 15 (7))." (Italics added.)

In short, the specific provisions of Section 15(1) and (7) of the Interstate Commerce Act, as interpreted for many years by this Court, other federal courts, and the Interstate Commerce Commission as well, support the proposition that the Commission here had authority to find that the present as well as the suspended rates were unlawful.

Appellants also contend that they had no notice that the lawfulness of the present rates was in issue and had no opportunity to be heard on such issue. This contention is untenable. The Commission's order of investigation of July 30, 1942, in I. & S. Docket No. 5139, instituting the proceeding, reads in part as follows:

"*It is ordered,* That the Commission • • • enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz.:

• • • •

And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs and supplements named in this order." (R. 142-144.)

That order—in view of the explicit provisions of Section 15(1) and (7) of the Interstate Commerce Act, the holdings of this Court, lower federal courts, and the Commission, especially the not uncommon practice of the Commission in cases of this kind to find both proposed and existing rates unlawful,—constituted notice to all parties, including the appellants, that the issue in the case was the lawfulness of the rates contained in the tariffs being investigated, and constituted notice likewise that the Commission could prescribe for the future rates which differed from those proposed regardless of whether the rates so prescribed were the same as or different from the rates already existing and in effect. At least one witness expressly stated that the Commission might decide "that the rates should be the same from all mines in the Brazil-Clinton, Indiana group via all routes and the same from all mines in the Linton-Sullivan, Indiana group via all routes." (R. 1557.)

In considering appellants' contention, this Court should also note that before the Commission these appellants *alleged and contended that the present rates were in issue and were in fact unlawful.* The following excerpt from the record before the Commission states the position of the Indiana coal producers who are members of the Coal Trade Association of Indiana, one of the appellants here, as testified to on direct examination by their witness, Mr. Harold V. Scott (R. 1060):

> "Q. [By Mr. Wilkinson]. What is the position of the Indiana operators with respect to the proceeding in issue?
>
> "A. • • • Our position with respect to Beloit and affected intermediate points, is that *the present rates* on bituminous coal from the Indiana mines are not less than reasonable maximum rates, but *are relatively unreasonable and excessive* • • • *in violation of Section 1 of the Act.* • • • Our position with re-

spect to the rates to destinations in Northern Illinois is that *the present rates* on bituminous coal from Indiana mines are not less than reasonable maximum rates but *are unreasonable and excessive;* * * *. Furthermore, *the present* and proposed rates to these Northern Illinois destinations *subject the producers and shippers of coal from Indiana mines to an undue prejudice and accord the producers and shippers of coal from Illinois mines,* who ship in interstate and intrastate commerce within the state of Illinois, *an undue preference in violation of Sections 3 and 13 of the Act, and subject some producers and shippers of Indiana coal to an undue prejudice and accord other producers and shippers of Indiana coal an undue preference, in violation of section 3 of the Act.*" (Italics added.)

This testimony shows that throughout the proceedings before the Commission the appellants took the position that the *present* rates were in issue. Witness Scott and his counsel stated that the "testimony and exhibits" that they had presented were "intended to prove * * * that the rates and differentials *as now in effect* and as proposed to the Northern Illinois destinations and as now proposed to Beloit, are not proper." (R. 1118. Italics added.) That is made clear also by the following testimony of witness Scott on cross examination (R. 1150-1151):

> "Q. (By Mr. Zoll) Mr. Scott, as I understand your testimony, you are of the opinion that *the present rates* from Indiana to these Northern Illinois destinations are unreasonable, in violation of Section 1, is that correct?
>
> "A. The present rates are unreasonable in violation of Section 1? *Yes.* Our contention is that probably the strongest—our principal contention is that they are relatively unreasonable with relation to the rates from the Illinois fields.

"Q. In relation to the present rates from Illinois?
"A. Both present and as proposed.
"Q. Then the answer to my question is yes?
"A. *Yes.* I modified it just a little.

• • •

"Q. I understood you to say that *the present rates* from Indiana were unreasonable.
"A. *Yes.*" (Italics added.)

Appellants not only recognized throughout the Commission proceeding that the present rates were in issue, but they also recognized that a full hearing was afforded on that issue. The following is taken from the Exceptions filed by the Coal Trade Association of Indiana to the Examiner's proposed report, dated July 15, 1944, included in the record on appeal:

> "In these proceedings, *under the issues involved in the Investigation and Suspension case* and the 13th Section case, *the present record is sufficient* for the Commission to determine the propriety of the level of the rates from the mines in Illinois and Indiana to these destinations in northern Illinois and Beloit, and the differentials to apply as between the mine origin groups in said States in the movement of coal to such destinations." (Page 17, Italics added.)
>
> "*There is no evidence omitted from this record which is necessary for a decision of these issues.* • • • We urge that the Commission exercise the jurisdiction conferred on it by the Act, and enter an order based on the facts, • • • and that there be no further postponement in making effective within this territory a rate adjustment that is fair and reasonable to all concerned, a rate adjustment that protects the interests of the consumer as well as the producers of coal in this territory." (Pages 111-112, Italics added.)

In showing this court that appellants have all along recognized what no one questioned, *i. e.*, that in this proceeding the lawfulness of the present rates was in issue,

these appellees are confronted with a veritable *embarras de richesses*. See, for example, the original brief of the Coal Trade Association of Indiana before the Commission, dated January 31, 1944, pages 26, 31, 35-6, 37-8, 43, 46, 52, 53, 62, 66, 85, 90, 104, 105. Many other similar references are to be found in the Exceptions and Petition for Reconsideration filed by the same party. Note particularly the following from the Exceptions:

> "This evidence is adequate and compelling to require a correction in the *present* situation, * * *." (Page 116. Italics theirs.)

And this:

> "We further submit that under the issues in I. & S. Docket No. 5139 and Docket No. 28881, the Commission has jurisdiction to enter orders finally disposing of the matter of the proper rates and relationships between the various Illinois groups and the Indiana groups to this destination territory, * * *." (Page 122.)

In conclusion, it is perfectly clear that the present rates were in issue before the Commission, that ample notice was given, that a full hearing was held, and that the Commission had jurisdiction to require that rates different from the present rates be established for the future.

**(B) The Commission did not overstep its jurisdiction in dealing with the rates to Beloit via the Southern Railway from Princeton and Boonville and via the single-line routes of the Milwaukee Railroad from Brazil-Clinton and Linton-Sullivan.**

Appellants contend that inasmuch as no change was proposed in the suspended schedules in the rates to Beloit, Wisconsin, via the Southern Railway from the Princeton and Boonville groups and via the single-line routes of the Milwaukee Railroad from the Brazil-Clinton

and Linton-Sullivan groups, the Commission had no power to require those rates to be changed. This contention is untenable.

Attention will first be directed to the rates of the Milwaukee Railroad from Brazil-Clinton and Linton-Sullivan to Beloit. From each of those two Indiana groups the present rates to Beloit were the same via all routes. That is, from Brazil-Clinton to Beloit the present rate was $2.10 via all routes, and from Linton-Sullivan to Beloit the present rate was $2.20 via all routes. By the schedules under suspension the carriers proposed to increase the rates from Brazil-Clinton to Beloit from $2.10 to $2.27 via all routes except via the single-line route of the Milwaukee Railroad. The Milwaukee proposed to keep the $2.10 rate for application over its single-line route. Similarly, the carriers proposed to increase the $2.20 rate from Linton-Sullivan to Beloit to $2.32 via all routes except the single-line route of the Milwaukee, which line proposed to retain the existing $2.20 rate for application over its single-line route.

The Commission's order of investigation of July 30, 1942, in I. & S. Docket No. 5139 reads in part as follows:

> "*It appearing*, That there have been filed with the Interstate Commerce Commission tariffs containing schedules * * * designated as follows:
>
> * * *
>
> Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees);
>
> Supplement No. 9 to I. C. C. No. B-7238
>
> Supplements Nos. 27 and 28 to I. C. C. No. B-7246
>
> Supplement No. 25 to I. C. C. No. B-7287;
>
> * * *
>
> "*It is ordered*, That the Commission * * * enter upon a hearing concerning the lawfulness of the rates,

charges, regulations and practices stated in the said schedules contained in said tariffs, viz.:

* * *

And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs and supplements named in this order." (R. 141-144.)

In short, the investigation in I. & S. Docket No. 5139 was into the lawfulness *of all rates contained in the tariffs named in the order.* It will be noted that among the Milwaukee tariffs specifically named is Supplement No. 27 to I. C. C. No. B-7246. Item 371 of that supplement states that the rate from Brazil-Clinton to Beloit, via the single-line route of the Milwaukee Railroad shall be $2.10, and that the rate from Linton-Sullivan to Beloit via the single-line route of the Milwaukee Railroad shall be $2.20 (R. 1646). In other words, the tariff under investigation contains the very rates of the Milwaukee Railroad which appellants say the Commission had no power here to change.

The Commission's order of investigation stated that the investigation was into the lawfulness of *all* rates contained in the suspended tariffs, and the hearings and evidence pertained to *all* such rates, and covered the single-line rates of the Milwaukee Railroad to Beloit.

Consideration of Section 15(1) and (7) of the Interstate Commerce Act will show that the Commission had the power to institute an investigation into the lawfulness of the rates shown in the Milwaukee tariff above referred to and upon evidence of unlawfulness to require a change in those rates. The point is well elucidated in the Commission's decision in *Coal Rates from Oak Hills, Colo.*, 30 I. C. C. 505, 508:

"Under section 15, paragraph 1, of the act, the Commission, on its own initiative, whenever it is of the opinion that any rates demanded, charged, or

collected are in any way unlawful, may enter upon an investigation, hold full hearings, and determine and prescribe just and reasonable rates. Where new rates are filed, the Commission, under section 15, paragraph 2 [now paragraph 7], is authorized by similar means to determine the propriety of such new rates and, pending such determination, to suspend the operation of the schedules stating such new rates. In connection with the latter hearing the statute casts upon the carrier the burden of justifying any increased rates.

"As has already been observed, the proposed rates include some increases over and some decreases under the present rates, *while in other cases the proposed rates are the same as the present.* The order herein shows plainly the intent of the Commission to enter upon a hearing concerning the propriety of the increases and the lawfulness of the rates under suspension, and provides that the operation of *all* schedules contained in the proposed tariff be suspended. Clearly, when the proposed rates involve increases or decreases they are new rates, and as to them the Commission's jurisdiction in this proceeding is full and complete by virtue of the second [now seventh] paragraph of section 15. *If the rates in which no change is proposed be not new rates, then they are necessarily rates 'demanded, charged, or collected,' and their investigation in this proceeding is proper under the first paragraph of section* 15. And certainly there can be no doubt under the second [seventh] paragraph of the Commission's power to suspend in its entirety the schedule stating these rates." (Italics added.)

It is clear that insofar as concerns the rates over the single-line routes of the Milwaukee Railroad from Brazil-Clinton and Linton-Sullivan to Beloit, the Commission had jurisdiction to enter the order of July 9, 1945, requiring those rates to be changed.

Turning now to the rates of the Southern Railway from Princeton and Boonville to Beloit. Here the situ-

ation is different from that of the Milwaukee's rates just discussed. The Southern Railway tariff included in the Commission's order of investigation dated July 30, 1942, does not contain any rates from Princeton or Boonville to Beloit (R. 1658-1661) and for that reason *the Commission made no findings or order with respect to those rates.*

This is evident from Conclusion No. 2 in the Commission's report, which contains the Commission's findings with respect to the rates to Beloit (R. 210-211). That conclusion relates only to "The proposed rates from the Brazil, Linton, and Princeton districts in Indiana to Beloit, as published in tariffs named in appendix E * * * ." Since the tariffs named in appendix E do not contain rates of the Southern Railway to Beloit (R. 221, 1658-1661), it is clear that the Commission has made no findings or order with respect to those rates. This is corroborated by the omission of Boonville from the Indiana groups named in Conclusion No. 2 (R. 210-211).

Appellants' contention that the order was therefore beyond the issues in the proceeding, is without merit.

## III.

## The Commission's Conclusions That the Present and Proposed Rates From Indiana Are Unlawful in Violation of Sections 2 and 3 of the Act Are Supported By Substantial Evidence and By Adequate Findings.

On page 6 of this brief it was explained how it came about that the present single-line rates of the Milwaukee Railroad from the Brazil-Clinton and Linton-Sullivan groups in Indiana to destinations in northern Illinois were lower than the joint-line rates—in which joint line basis the Milwaukee joins (R. 181)—from the same groups to the same destinations. In their

proposed schedules, which were suspended in I. & S. Docket No. 5139, the carriers did not propose to correct that situation. The same increases were proposed in the joint-line rates as in the single-line rates to northern Illinois destinations, thus continuing the Milwaukee's single-line rates on a basis lower than the joint-line rates. The same can be said for the single-line rates of the Illinois Central from Linton-Sullivan which the carriers proposed to continue on a basis lower than the joint-line rates from that group. In fact, it was proposed to extend the dual basis to the Princeton group and to Beloit (R. 179).

In its report the Commission held that this so-called dual basis or multiple basis of rates resulted and would continue to result in unjust discrimination and undue preference and prejudice. The Commission proceeded to prescribe one basis of rates from those groups, to apply over single-line as well as joint-line routes, which is *lower* than what the carriers proposed over joint-line routes but *higher* than what was proposed over the Milwaukee's and Illinois Central's single-line routes. This holding is reflected in Conclusion No. 1 to the Commission's report (R. 210). A somewhat similar holding was made in Conclusion No. 2, with respect to the proposed rates to Beloit (R. 210-211).

It is these two Conclusions, containing the Commission's holdings of unjust discrimination and undue preference and prejudice, which appellants attack as being unsupported by adequate findings or substantial evidence. To pass on this contention, it is necessary to analyze the above Conclusions somewhat more closely. Conclusion No. 1 can be taken as representative.

In Conclusion No. 1 the Commission concluded that the dual basis of rates (*i. e.*, lower rates over the Milwaukee's single-line routes than over joint-line routes),

"would result in *unjust discrimination* as between shippers and receivers of coal transported in whole or in part by the Milwaukee or the Illinois Central railroads, in violation of section 2 of the act." (R. 210.) That is, for example, a shipper or receiver of coal transported from a mine on the C. & E. I. in the Brazil-Clinton group, originating on the C. & E. I., interchanged with the Milwaukee and delivered by the Milwaukee at destination, would pay a higher rate than a shipper or receiver of coal transported from a mine on the Milwaukee in that same group and transported to the same destination by the Milwaukee alone.

In Conclusion No. 1 the Commission also concluded that the present and proposed rates would result in *undue preference and prejudice* in violation of Section 3 of the Act (R. 210). The Commission held (1) that the present rates as well as rates which the carriers proposed would result in undue preference and prejudice *as between the origins in the Brazil and Linton groups.* That is, an origin on the Milwaukee in the Brazil group would be preferred in that it would have a low single-line rate of the Milwaukee available to it to certain destinations, and an origin on the C. & E. I. in the same group would not have such low rate available to it. And the Commission held also (2) that the present and proposed rates would also result in undue preference and prejudice *as between the Indiana districts and the points in each of such districts.* That is, for example, an origin on the Milwaukee in the Brazil district would be preferred and an origin in the Princeton group would be prejudiced in that the former would have available a single-line rate via the Milwaukee to some destinations which would be further below the rate from the Princeton origin than the Commission concluded was necessary to avoid undue prejudice to the Princeton origin. (See R. 182.)

**(A)**

Appellants first say that Section 2 is not applicable to this situation, that Section 2 covers only the situation where there are unequal charges to shippers who ship *from the same origin point over the same route* to the same destination. This contention is unsound. Section 2 contains no such requirement. Cases cited by appellants Ayrshire Collieries Corporation, et al., including *United States* v. *Chicago Heights Trucking Company*, 310 U. S. 344, do not support appellants' contention.

Section 2 forbids different charges for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Unlike Section 4 of the Act, Section 2 does *not* require transportation "over the same line or route." Section 2 has been construed as requiring equality of rates between shippers in the same switching district or the same community (*Richmond Chamber of Commerce* v. *S. A. L. Ry.*, 44 I. C.C. 455, 464; *Boger & Crawford* v. *Seaboard Air Line Ry. Co.*, 157 I. C. C. 227), and when a number of origin points have been gathered together into one rate group for rate making purposes, as is the case here, then Section 2 has been construed as enforcing equality as between all shippers in that rate group. *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 173 Fed. 1 (reversed on other grounds in 230 U. S. 184); *Langdon* v. *Pennsylvania R. Co.*, 194 Fed. 486 (reversed on other grounds in 208 Fed. 145). As this Court held in *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, "The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for [substantially] *similar* transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.'" (P. 352. Italics added.)

**(B)**

Turning next to the question whether the Commission's findings of violations of Sections 2 and 3 are supported by substantial evidence, appellants say that the only evidence to support the Commission's holdings of unjust discrimination and undue preference and prejudice was "the fact of the measure of such rates and the distances over which such rates applied to various destinations." (R. 11.) This is clearly wrong. Merely a reading of the Commission's report shows that the findings of unjust discrimination and undue preference and prejudice are supported by considerably more evidence than that of just rates and distances.

In considering the lawfulness of the rates, the Commission first considered the total tonnage moving from Brazil and Linton to representative northern Illinois destinations. This evidence was contained in Exhibit 4, Section VIII, introduced by the carriers (R. 1677). In its report the Commission adverts to this evidence, and observes that the Milwaukee, which maintained a low single-line basis of rates from Brazil and Linton, transported the great bulk of the tonnage from those groups although there were only a relatively few mines on its lines in those groups (R. 180, 182-183):

> "Four of the 30 origin points in the Brazil group and about 9 of the 31 origins in the Linton group on coal to this destination territory are served by the Milwaukee. * * * In a recent period said to be representative, but not detailed of record, of the total Brazil and Linton tonnage moved to Rockford, the Milwaukee transported under its single-line rates 95.4 percent from the Brazil group and 78.5 percent from the Linton group. There was some movement from the other mines in each of the groups, but apparently it was relatively small. Nevertheless, the only justification offered by the Milwaukee for

> insisting on lower rates than those of the other carriers, except the Illinois Central from the Linton group, is its fear that there would be relatively little movement from mines served by it if its rates were made the same as those from the mines on the competing carriers to the same destinations."

Passing from a consideration of the tonnage transported under the rates, the Commission considered the relative operating conditions, concluding (R. 183):

> "The transportation conditions over the single-line routes of the Milwaukee and the Illinois Central do not differ materially from those over the joint-line routes to the same destinations from other mines in the same group, in many of which latter routes, as stated, the Milwaukee and the Illinois Central participate. There is no important difference in the average distances over those respective routes."

Appellants contend, however, that there was no evidence as to the similarity of operating conditions over the Milwaukee's single-line routes and other routes from mines in the same groups (R. 11). Their allegation is incorrect. The record before the Commission contains the testimony of Mr. W. J. Whalen, Superintendent of the Milwaukee Railroad, who described the handling of coal and the operating conditions encountered via the Milwaukee's single-line routes from Brazil and Linton to destinations in northern Illinois and to Beloit (R. 778-802). The record also contains the testimony and exhibits of Mr. C. H. Fischer, Superintendent of Transportation of the Chicago & Eastern Illinois Railroad Company, with respect to that company's handling of coal from mines in Brazil and Linton served by it, and the operating conditions encountered by it (R. 802-807, 1683-1684). Appellants Ayrshire Collieries Corporation, et al., purport in their brief to summarize all this evidence.

While they disclaim any intention to do so, they are nevertheless simply arguing the weight of the evidence, which is improper before this Court. The record contains substantial evidence on operating conditions (R. 732-778, 802-824, 1683-1684). In that evidence the Commission had a great deal to support its finding that transportation conditions and distances over the Milwaukee's single-line routes were substantially similar to those obtaining over joint-line routes.

The position which appellants are taking on this point of transportation conditions before this Court is exactly the opposite of the position they took before the Commission. In the Coal Trade Association of Indiana's Reply to Exceptions to the Examiner's Proposed Report, dated September 8, 1944, included in the record on appeal, it was contended—

> "However, the evidence shows that *the operating conditions are similar as between the principal carriers serving Illinois and Indiana within Illinois and from Indiana to Illinois* and also to the destinations in Iowa and southern Wisconsin." (Page 24. Italics added.)

Further on in the same brief it is said—

> "The evidence respecting the C & E I, which serves both States, is shown on Exhibits Nos. 18 and 19, and shows that *the tonnage ratings, grades and curves are substantially similar in both States.* That evidence, coupled with the fact that the Indiana mines are within a 'stone's throw' of the mines in Illinois and are *in a territory of the same general topographical features*, a fact of which the Commission can take judicial knowledge, is sufficient to establish *the similarity of the operating conditions in the transportation of coal from the two States to these destinations in northern Illinois* especially when it is coupled with the fact that over a *sub-*

*stantial portion of the haul the coal from Illinois and Indiana is handled by the C M St P & P and the C & N W and moves from the interchange points in the same trains over the same tracks to the same destinations.*" (Pages 24-25. Italics added.)

The contention was again clearly stated as follows—

"We submit that this record clearly establishes that *the service of originating coal in Illinois and Indiana and transporting it to the destinations here involved is a service performed under substantially similar operating conditions from both States, irrespective of the fact that only five railroads offered evidence as to their operations.* They are illustrative of the general conditions that exist in the two States, and the general conditions that exist from those two States to Wisconsin and Iowa destinations." (Pages 25-6. Italics added.)

Witness Scott, testifying for the Coal Trade Association of Indiana, said:

"I have testified in this proceeding that to my knowledge transportation conditions were similar from Indiana mines and from Illinois mines." (R. 1209. See also R. 1239.)

Appellants were right when they contended before the Commission that "the operating conditions are similar as between the principal carriers serving Illinois and Indiana" and when they contended there was substantial evidence in the record to sustain such a finding by the Commission. They are wrong when they contend the contrary before this Court. See also page 51, *infra*.

To return to the Commission's report: Having considered the facts that although operating conditions over the Milwaukee's single-line routes were substantially the same as over joint-line routes, the Milwaukee was maintaining lower rates over its single-line routes and was thus getting the great preponderance of the tonnage,

with mines on other lines shipping but little, the Commission stated (R. 183):

> "Normally, coal sales turn on a price difference of as little as a few cents a ton."

The Commission also stated the matter thus (R. 206):

> "In general, all of the mines in these districts produce coal of the same quality and grade, and a difference of a few cents per ton in the transportation charge is normally sufficient to divert a coal contract from one mine to another."

This last conclusion or observation is conceded by appellants to be accurate, for they say (R. 33):

> "The Commission has recognized that a few cents per ton in delivered costs, which includes the freight rate, controls the purchase of coal."

See also R. 35. Appellants, however, say that there was no evidence to support the statement that in general the mines in these Indiana groups produce coal of the same quality and grade. This is incorrect. The witness for the Coal Trade Association of Indiana itself, one of the present appellants, testified (R. 1145):

> "The coal produced in the four groups in Indiana for the most part, in general—I am not going into detail—in general is similar. They must compete with each other for the markets."

This was later amplified (R. 1181-1182):

> "Q. • • • What do you mean by 'substantially similar'?
>
> "A. Oh, the coal, the different veins of coal produced in the different districts of Indiana are somewhat similar, and the quality of the coal itself is generally similar."

Cf. also R. 1187. As indicating the irrelevancy of appellants' contention, it should be noted that in the words of the Commission—

> "It is also true that coal rates are not, and as a practical matter may not be, made to depend upon the quality of the coal to which the rates are applied." *Rates on Coal from Missouri*, 159 I. C. C. 617, 627. See also *Coal Trade Association of Indiana* v. *Algers, W. & W. Ry. Co.*, 232 I. C. C. 356, 361.

In short, there is substantial evidence for the Commission's statement that "In general, all of the mines in these [Indiana] districts produce coal of the same quality and grade." (R. 206.) Even if the statement were unsupported by the evidence and were in fact untrue, and the coal produced by mines on the Milwaukee were of a poorer grade and quality than that produced elsewhere in Indiana, that difference in quality and grade would nevertheless not justify a lower basis of rates via the single-line routes of the Milwaukee Railroad.

Following these recitals of the evidence, the Commission said (R. 183):

> "Plainly, therefore, only by the establishment and maintenance of a single rate basis from each of these coal-rate districts can unjust discrimination and undue prejudice be avoided."

The report shows that the Commission gave specific thought to the question whether it was justified on the basis of the evidence of record to make findings under Sections 2 and 3(1), for the Commission said (R. 183):

> "Under the circumstances recited, an extensive showing of injury through the loss of tonnage to particular coal shippers or consumers by reason of the discriminatory rates here before us is not required. *United States* v. *Trucking Co.*, 310 U. S. 344."

The case cited (*United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344) furnishes a direct answer to a good many of the arguments here advanced by the appellants. For example, appellants say that no one con-

tended the rates were unjustly discriminatory or unduly prejudicial (R. 12-13); that there was no evidence that any particular person or company or consumer was or would be subjected to unjust discrimination or undue preference or prejudice (R. 11-12, 17); and that there was no evidence that any particular mine in Indiana would have shipped more coal in the absence of lower rates from mines on the Milwaukee (R. 12, 17). Appellants also argue that *findings* as to each of these matters are necessary. These arguments are all answered by the decision of this Court in the *Chicago Heights Trucking Company case, supra.*

In that case this Court upheld an order of the Commission where the Commission had found that certain rail rates "were unlawfully discriminatory in affording lower rates to 'forwarders' of freight than to other shippers." (310 U. S. 344, 345.) Like in the case at bar, it was there contended that the evidence of record did not support the Commission's conclusion and the evidence which was there said to be lacking is the very evidence which appellants here say is indispensable. The Court put it this way (pp. 350-1):

> "Respondents contend that the Commission improperly concluded that the canceled tariffs create undue preferences or advantages resulting in unjust discriminations in violation of 216 (d) *because there was no evidence that the suspended rates would subject any particular person or type of traffic to disadvantage or injury;* • • •: [because] *the only evidence before the Commission was introduced by respondents; and* [because] *no shippers complained of injury.*" (Italics added.)

The Court, however, rejected these contentions—the very same ones that the appellants are making here—, saying (pp. 353-4):

"The fact that the Commission acted on its motion without complaints by individual shippers did not detract from the Commission's power to protect and maintain a transportation system free from partiality to particular shippers. The Commission acted in its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest. Its order was the embodiment of the Commission's judgment that the proposed tariff was a discrimination prohibited by the Act. 'The judgment so exercised, being supported by ample evidence, is conclusive.' "

The Court also said (pp. 352-3):

"'It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.' [*United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320.] And where a court substituted 'its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute.' [*Supra.*] So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' *And the courts have always recognized that Con-*

*gress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination.*" (Italics added.)

In *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297, 304, this Court said:

> "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. See *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 481; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; cf. *United States Navigation Co.* v. *Cunard S. S. Co., supra*, 484. Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. *Manufacturers Ry. Co.* v. *United States, supra; Pennsylvania Co.* v. *United States, supra*, 361; *Seaboard Air Line Ry Co.* v. *United States*, 254 U. S. 57, 62; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196; *Nashville, C. & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, 322."

See also *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546.

In numerous pleadings filed in the proceeding before the Commission, appellants made statements which again conflict with their contentions in the case at bar. For example, the Coal Trade Association of Indiana *actually alleged in their petition for suspension that the dual basis of rates resulted in unjust preference of shippers on the Milwaukee Railroad and undue prejudice of shippers on other lines* (R. 132, fol. 243). Their position was reiterated by their witness, Mr. Harold V. Scott (R. 1060). Further, in their Exceptions to the Examiner's Proposed Report, dated July 15, 1944, it was contended:

"In these proceedings, under the issues involved in the Investigation and Suspension case and the 13th Section case, the present record is sufficient for the Commission to determine the propriety of the level of the rates from the mines in Illinois and Indiana to these destinations in northern Illinois and Beloit, and the differentials to apply as between the mine origin groups in said States in the movement of coal to such destinations." (Page 17.)

It was also there urged that:

"The record shows the transportation conditions within Illinois and from Indiana to these destinations to be the same. *There is no evidence omitted from this record which is necessary for a decision of these issues.* Why postpone again to a future proceeding, whether by way of arbitration or by way of some hitherto unknown type of proceeding before this commission, the question of the final disposition of the issue of the proper relationship and measure of the rates from these two competing sets of origin groups in Illinois and Indiana to this important destination territory? * * * We urge that the Commission exercise the jurisdiction conferred on it by the Act, and enter an order based on the facts, * * * and that there be no further postponement in making effective within this territory a rate adjustment that is fair and reasonable to all concerned, a rate adjustment that protects the interests of the consumer as well as the producers of coal in this territory." (Pages 111-112. Italics added.)

Attention should also be called to the fact that Mr. W. H. Kuhls, witness for the Milwaukee Railroad, testified that he did not see why there should not be but one rate via all routes from all mines in each of the Indiana groups to each destination in northern Illinois (R. 591).

The following is from his cross-examination:

"Q. * * * the other roads in Indiana, if they are going to move coal in a competitive market must have

the same rates as you have, must they not, from the Brazil-Clinton Field?

"A. I think that is axiomatic." (R. 542.)

He also said:

"In my opinion, in normal times coal from the same origin group would have to have a parity of rates with competing coal to be marketed in this territory." (R. 563.)

A witness representing coal mines in the Princeton and Boonville groups in Indiana testified to the same effect (R. 1466).

The Milwaukee's witness also admitted that there were no differences in distances or in transportation conditions that warranted lower rates via the Milwaukee's single-line routes than via other routes from the same group (R. 541-542, 553-554).

The Milwaukee Railroad and the other appellants ought not to be now heard to say that the evidence does not support the Commission's report and order.

In their brief before this Court, appellants Ayrshire Collieries Corporation, et al., attack the Commission's finding of undue preference and prejudice by saying that there was no proof that the dual basis of rates injured shippers on lines other than the Milwaukee (Brief, p. 48). As shown, however, the Commission's finding to the contrary is supported by the record, including statements of appellants' own witnesses. Further, the Court should note the following from *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry. Co.*, 206 I. C. C. 445, 448, order upheld *Chesapeake & O. Ry. Co.* v. *United States*, 11 F. Supp. 588, 296 U. S. 187:

"Even though complainant's members may not be injured, their competitors are preferred. Preference, not necessarily injurious in itself, affords opportunity

to gain success over and injure the other party. The act is specifically directed against undue preference and all other forms of unjust treatment of the shipping public."

There is substantial evidence to support the Commission's conclusion that the present and proposed rates are in violation of Sections 2 and 3 of the Interstate Commerce Act.

**(C)**

Appellants say that there are inadequate findings to support the Commission's conclusions. They say that those conclusions, to the effect that the rates are unjustly discriminatory and unduly preferential and prejudicial, are not supported by factual findings to enable this Court to understand the Commission's rationale. This contention is not tenable. There are ample findings of fact in the report, as explained in the preceding subsection of this brief.

The Commission's report explicitly sets forth that shippers and receivers using the higher rates from the Indiana groups were being and would continue to be unjustly discriminated against and unduly prejudiced because other shippers and receivers had available and were using the lower rates accorded by the Milwaukee Railroad. In the *Chicago Heights Trucking Company case, supra*, this finding that some shippers would be accorded lower rates than others was held sufficient, but here the Commission's report goes on further to elucidate the finding of unjust discrimination and undue prejudice by pointing out how the lower rates had been accompanied by a virtual monopoly of the traffic.

These appellees submit that the Commission's order is supported not only by substantial evidence but also by proper and adequate findings of fact. See *United*

*States* v. *Pierce Auto Lines*, 327 U. S. 515, 535-6. As Justice Cardozo said of another report of the Interstate Commerce Commission—

> "In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of its report." (*Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 287.)

The thoroughness and painstaking consideration which are evident from this report go a long way toward refuting appellants' contentions.

## IV.

## The Commission's Findings and Order Are Not Invalid Because of Any Lack of Effective Control on the Part of the Milwaukee Railroad Over the Higher Joint Line Rates.

In Conclusion No. 1 (R. 210), the Commission found that to destinations in northern Illinois the present and proposed rates from the Indiana groups were causing and would continue to cause unjust discrimination and undue preference and prejudice in violation of Sections 2 and 3 of the Interstate Commerce Act. In Conclusion No. 2 (R. 210-211) a comparable finding was made with respect to the proposed rates to Beloit, Wis. The Commission ordered the violations of Sections 2 and 3 removed and stated what rates and relationships should be established for the future.

One of the effects of this order, as previously explained, was to require the carriers to do away with the dual basis of rates from the Indiana groups and to establish one basis of rates from each group. Appellants attack the order on the basis of the decision in *Texas & Pacific Ry.*

*Co.* v. *United States*, 289 U. S. 627, where this Court said (p. 650):

> "A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under section 3 an alternative must be afforded."*

Appellants contend that the Commission's order for correction of the disparity—*i. e.*, for the elimination of the dual basis of rates—is invalid because of the fact that the Milwaukee, they say, has no control over and does not effectively participate in the higher joint-line rates from the Indiana groups. Appellants allege that the Milwaukee could not force the carriers participating in the joint-line rates to reduce such rates, and that therefore to correct the unlawfulness by making the single-line and joint-line rates the same, the Milwaukee would have to increase its single-line rates to the level of the joint-line rates. In other words, having no control over the joint rates, the Milwaukee says it has no alternative, and not being afforded an alternative, it says that the order of the Commission contravenes the principle stated in the *Texas & Pacific case*. (See R. 13, 18, 47-48.)

**(A)**

A complete answer to appellants' contention lies in the footnote to the passage quoted above from the *Texas & Pacific case*, which footnote appellants ignore. That footnote says that where an order is made under Section 15, the Commission does not need to afford an alternative:

*Succinctly stated in the syllabus as follows: "A carrier may not be held responsible for undue prejudice or preference to a locality in respect of rates unless both of the localities affected are upon its lines or it effectively participates in rates to both so that it may have the choice of raising one rate, lowering the other, or altering both."

> "This is not true of an order pursuant to § 15(1), prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section."

In other words, where the Commission finds undue preference and prejudice to exist, it can prescribe the maximum or minimum or specific rate which shall be established by the carriers to get rid of the undue preference and prejudice, and does not have to afford the carriers or any of them alternative methods of curing the unlawfulness. Where the Commission requires certain rates to be established in such a case, it ceases to be material whether or not any carrier or group of carriers has effective control over the rates, because the question of affording alternatives no longer arises.*

This principle was one of the grounds of decision in *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, where this Court upheld an order of the Interstate Commerce Commission which required a certain rate to be established in order to eliminate unjust discrimination:

> "There is no merit in the contention that the order was a § 3 order and invalid for failure to afford the carriers an alternative of raising the contested rate or lowering others to remove discrimination. It is true the Commission found prejudice to shippers all rail, but in essence the order entered was a § 15 order and not one made under § 3." (P. 480.)

In short, before one who has been ordered to remove discrimination can do so, he must have sufficient control over the situation to remove it. Hence the rule applicable to Section 3 orders, that an alternative must be afforded.

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* "Since this power [to prescribe minimum or specific rates under Section 15] is specifically applicable to cases of undue prejudice, a preferential rate can be eliminated by its exercise without allowing a carrier any choice of alternatives, and hence presumably without the necessity of a finding that the railroad controls both rates." 47 Harv. L. Rev. 494, 501.

But when the order is made under Section 15, the situation is different. The coercive legislative power of government is applied. The reason for the effective control-and-alternative rule in such cases no longer exists.

The proceeding before the Commission was begun and carried on under the provisions of Section 15, as was explained previously in this brief, and the rates shown in Appendices A and D as approved rates are, by the order under attack, prescribed as specific rates under the authority of Section 15 of the Interstate Commerce Act.

Appellants say the Commission did not prescribe any rates by its order. This is not so. The Commission found unjust discrimination and undue preference and prejudice to exist, and ordered the carriers to publish rates that would put an end to those violations of law. The Commission set forth in Appendices A and D rates which would effectuate that end, such rates also being maximum reasonable rates (R. 211). The report and order speak in terms of relationships, but under the order *no other rates could be established* which would get rid of the unjust discrimination and undue preference and prejudice the Commission found to exist.

The order relates the rates from Indiana to Beloit to the rates from Illinois to Beloit, and there being no proposal to alter the latter, rates from Indiana to Beloit had to be established under the order exactly as set out in Appendices A and D (R. 210-211). The rates to Rockford being held 15 cents under the rates to Beloit by virtue of the Commission's order in *Fairbanks-Morse & Co.* v. *Alton & S. R.*, 251 I. C. C. 181, rates to Rockford, and hence northern Illinois, also had to be established exactly as set forth in Appendices A and D.

The Commission's order clearly *required* that the rates shown in Appendices A and D as approved rates be es-

tablished, and they were in fact established, pursuant to that order, effective July 23, 1946. Appellants' contention regarding the Milwaukee's alleged lack of effective control over the joint line rates from the Indiana groups, should be rejected.

**(B)**

But even apart from the fact that the order in this case was entered under Section 15 and therefore questions of an alternative order and effective participation and control are not relevant, appellants' argument is untenable for the reason that the order is directed at a group of railroads, not the Milwaukee only, and that group of railroads, including some of these railroad appellees, do in fact constitute a "group of carriers," such as referred to in the *Texas & Pacific case*, which is the "common source of the discrimination."

The New York Central Railroad, the Chicago & Eastern Illinois Railroad, and the Pennsylvania Railroad each serves Brazil as well as Linton, and each, in conjunction with the Milwaukee Railroad as a destination carrier, participates in the joint-line rates in question from both Brazil and Linton to Rockford. Hence, those four carriers, as a group, are the carriers whose rates cause the undue preference and prejudice. As this Court said in *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, 259:

> "Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under § 3 to remove discrimination so practiced. See *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144."

The Commission has found that the rates involved reflect relations among themselves which are unduly preferential of certain origins and unduly prejudicial to others. It is the *entire adjustment,* not just the rates of the Milwaukee Railroad, which causes undue preference and prejudice. The Commission's finding runs against the whole multitude of relationships between one rate and another existing in this adjustment.

There is no doubt but that the carriers participating in this adjustment of rates, as a group, exercise control over the rates involved in the structure and the relations reflected by those rates. A quite similar situation was described by the Commission as follows in *Ohio-Kentucky Associated Industries* v. *Ahnapee & W. Ry. Co.,* 256 I. C. C. 137, 143:

> "Each of [the railroads] effectively participates in joint rates between every one of the origins named and the destination territory described in the complaint, and *together* they constitute a *group of carriers* which is the *common source* of the alleged prejudice to Cincinnati-Louisville and preference of St. Louis. In other words, the cause of the alleged undue prejudice and preference here is *the entire structure of rates established by defendants* from both the St. Louis and Cincinnati-Louisville groups. This structure is a single entity composed of interrelated rates bound together by origin differentials and destination groupings, and, so long as it remains in existence, *each of these defendants effectively participates not only in the rates over its own line but in every rate in the entire structure, and together they control all rates therein.*" (Italics added.)

Appellants approach this question as though the structure could be broken down into particular rates and the *Texas & Pacific case* doctrine of effective participation applied to such individual rates. But in an adjustment

as competitive and delicately balanced as is this coal rate adjustment, such an approach ignores the fact that the rates constitute an integrated and cohesive structure, are interdependent, and cannot properly or adequately be considered as individual rates. As the Commission said in the leading case of *Albany Port District Commission* v. *Ahnapee & W. Ry. Co.*, 219 I. C. C. 151, 172:

> "Here the cause of the alleged undue prejudice and preference is the *entire structure* of port rates established by defendants serving the north Atlantic ports and their connections. *This structure is not a loose aggregation of separately established rates, but a single entity composed of interrelated rates bound together by the port differentials.*" (Italics added.)

See also *Beaumont, Texas, Port Commission* v. *Abilene & S. Ry. Co.*, 253 I. C. C. 127, 131-2.

If appellants were right in their contention, the Commission "would be without power to remove prejudice existing in any extensive rate adjustment." *Albany Port District Commission* v. *Ahnapee & W. Ry. Co., supra*, p. 172.

The Interstate Commerce Commission has pointed out in a recent case that:

> "Section 3 of the act was designed expressly to provide a forum in which a shipper may complain of an adjustment which, as here, tends to concentrate the movement of the traffic from other origins and deprives him of a fair opportunity to make shipments." (*Franklin Limestone Co., Inc.* v. *Alabama G. S. R. Co.*, 264 I. C. C. 753, 758.)

That statement can not be gainsaid, and it is relevant to the controversy here before this Court.

(C)

Finally, an answer to appellants' contention is this: the absence or existence of effective participation in and control over the rates making up this adjustment is *a question of fact*, and on this the Commission has spoken, both by its report and order and by its denial of the petitions for reconsideration which made this same argument. The Commission's finding, on a factual matter entrusted to it for determination, being adequately supported by the evidence of record, should not be disturbed by a court. *Virginian Railway* v. *United States*, 272 U. S. 658, 663; *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, 481-2.

V.

**There Is Substantial Evidence to Support the Prescription of the Relationships Reflected By the Rates Set Forth in the Report As Approved Rates.**

It would appear from the many criticisms which they make of the relationships required by the report, that appellants seek to create the impression that in determining upon those relationships the Commission was guilty of arbitrary and capricious action. Nothing could be further from the truth. The rates set forth in the report as approved rates, *i. e.*, rates reflecting relationships which would rid the adjustment of unjust discrimination and undue preference and prejudice, reflect careful consideration. There is substantial evidence to support the order by which those relationships and rates were prescribed.

In its report the Commission finds that the dual basis of rates from the Indiana groups to Beloit

and these northern Illinois destinations is unlawful (R. 184) and that the proposed revision of rates is unreasonable and results in unjust discrimination and undue preference and prejudice (R. 208, 210-211). The Commission then proceeds—

> "* * * to a determination of the fair and reasonable relations which should exist between the respective *origin groups*, and between the Indiana and the Illinois groups, to these destinations; * * *." (R. 184.)

Upon considering the evidence bearing on this aspect of the case (R. 184-195), the Commission arrives at the conclusions reflected in Appendix A (R. 213-217).

First, the Commission discusses the comparative operating conditions from the Illinois and Indiana mines to this destination territory (R. 185). Then it deals with the differences in competitive conditions as reflected by the tonnage moving from the Illinois mines and the Indiana mines to these destinations and to all destinations (R. 185-186). The Commission then considers differences in competitive conditions as reflected in figures of production for the various origin groups in Illinois and Indiana. (R. 186.)

The Commission then passes to the proposed relation between the rates from the Boonville group and the rates from the Princeton group, and after considering production figures, the number of mines in the Boonville group and the location of the largest, the tonnage moving from Boonville to this destination territory, distances, and the results that would flow from merger of the groups, the Commission concludes that the rates from Boonville should be on the same basis as from Princeton (R. 186-187). Then the Commission takes up the proper relation between the Brazil and Linton groups, and

after stating and considering the rates, averages of rates and comparative differentials, and after considering the volume of movement from the two groups since 1923, concludes that the proper differential between those two groups should be 10 cents (R. 187). Subsequently, the Commission considers the differential between the Linton and Princeton groups and after considering the evidence on that matter, permits it to remain at 7 cents (R. 190).

In short, the Commission, on clearly substantial evidence, concludes that the proper and lawful differentials between the Indiana groups should be Brazil 10 cents less than Linton, and Princeton and Boonville each 7 cents over Linton.

The Commission gives much consideration to the question of the relation of the rates from Indiana to those from Illinois. The key paragraph in this part of the report reads as follows (R. 187):

> "If the proposed rates from the Indiana groups which are higher than the so-called normal basis were reduced to the latter basis, and if the single-line rates of the Milwaukee and the Illinois Central from the Linton district were increased to the normal basis proposed from the other mines in that group, the rates from all of the Brazil mines made 10 cents less, and the Princeton-Boonville rates made 7 cents more, the resulting rates to the 12 destinations would average $1.95 from Brazil, $2.05 from Linton, and $2.12 from Princeton-Boonville. Such rates, referred to hereinafter as approved rates, compare favorably with the proposed rates from the Illinois groups to the same destinations, with the exception of certain of the rates from the Fulton-Peoria, Danville, and DuQuoin groups."

The Commission's approach can be more easily apprehended if that paragraph is considered step by step. The Commission says that (1) if one eliminates the rates from the Indiana groups that are higher than the group

basis and that are therefore actually no factor in moving traffic ("If the proposed rates from the Indiana groups which are higher than the so-called normal basis were reduced to the latter basis,"), and (2) if the proposed joint-line rates from Linton are used via all routes to the twelve representative destinations ("and if the single-line rates of the Milwaukee and the Illinois Central from the Linton district were increased to the normal basis proposed from the other mines in that group,"), and (3) if the rates from Brazil to each of those destinations are made 10 cents under such rates from Linton, which is the differential the Commission has just concluded would be the lawful and proper differential ("the rates from all of the Brazil mines made 10 cents less,"), and (4) if the rates from Princeton and Boonville are made 7 cents higher than such rates from Linton, which is the differential the Commission has just concluded would be lawful and which it orders continued ("and the Princeton-Boonville rates made 7 cents more,")—then, the Commission says the rates thus established to the twelve destinations which are representative of this territory, would average $1.95 from Brazil, $2.05 from Linton, and $2.12 from Princeton-Boonville. The Commission says that such rates "compare favorably with the proposed rates from the Illinois groups to the same destinations, with the exception of certain of the rates from the Fulton-Peoria, Danville, and DuQuoin groups." The Commission then proceeds to treat the rates from those three Illinois groups last named. (R. 188-189.)

Then the Commission goes on to show that such average rates from *each* of the Indiana groups to the twelve representative northern Illinois destinations compare favorably with the average of the rates approved (later prescribed as minima by order in No. 28881; see *supra*,

pp. 10-11) from Illinois groups to those destinations. For example, the Commission shows that when measured by the so-called Indiana-Illinois and Midland scales of coal rates, the average of the approved rates from Brazil to the twelve destinations compares favorably with the average of the approved rates to those same twelve destinations from (1) the Danville group, (2) the Springfield group, (3) Fulton-Peoria, (4) Princeton-Boonville, and (5) southern Illinois (R. 189). Similar detailed comparisons are made with respect to the rates from the other Indiana groups (R. 189-190). The Commission concludes with a comparison of the average of the approved rates to these destinations from the Indiana groups as a whole, with the average of the approved rates to these destinations from the Illinois groups as a whole (R. 191).

We come now to a specific criticism which appellants lodge against this reasoning and approach on the part of the Commission. They say that in prescribing rates to *individual* destinations, the Commission cannot be guided by the *average* of the rates from any one origin group to representative destinations.

While appellants thus contend that the Commission should have constructed its prescribed rates with particular regard to individual rates and destinations, they said before the Commission that "*We are here dealing with a rate structure, not with individual rates to each individual destination* in this whole northern Illinois territory." Exceptions of Coal Trade Association of Indiana to Proposed Report of Examiner, p. 106. (Italics added.) Again in those Exceptions it was stated (p. 106):

> "What must be decided is whether *the body of rates* within Illinois on coal moving *to this destination territory* is on a higher level than *the body of rates* from the Indiana groups *to the same territory.*" (Italics added.)

In determining upon the prescribed rates in the manner in which it did, the Commission proceeded in the very way advocated by the witness for the Milwaukee Railroad, Mr. W. H. Kuhls, who urged that the destination territory be treated "*as a unit*" (R. 548) and "*as a whole*" (R. 593). The witness for the Coal Trade Association of Indiana testified to the same effect:

> "Q. What you mean by that is that the whole thing is one adjustment?
>
> A. That is right.
>
> Q. You can't take any part of it any more than you can take the short and long haul of a particular group?
>
> A. That is right." (R. 1148.)

The Commission has in this case considered the rates on coal to this destination territory, and has, after obviously careful consideration, decided upon a principle to be followed in constructing rates to this territory. The Milwaukee contends that principle is arbitrary and capricious. It clearly is not. It is based on a reasoning and a method which appellants themselves advocated and to which the Commission has given much thought. The problem is technical and the Court ought not to hold the method and reasoning improper. "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586.

Nor does the Commission's order produce any arbitrary result. Appellants argue that the prescribed rates are arbitrary because to Rockford, which they select as an example, the rate prescribed from the Brazil group is 12

cents higher than the rate prescribed from the Springfield group, although the average distance from each group to Rockford is about the same.*

But the Commission explained fully in its report why the rates it prescribed did not strictly reflect distance (R. 194-195). It said in part (R. 194):

> "In approving the foregoing rate relations, we have kept in mind the importance to consumers, coal operators, and railroads of relating these differentially related coal rates, not strictly upon distance, but so as to afford all concerned a fair opportunity to compete in the purchase, sale, and transportation of coal from Illinois and Indiana mines to these destinations. The rates between the various origin groups in these fields have never been made with primary regard for distance, and to so make them now would have the effect eventually of eliminating practically all competition between most of them, a result which would be highly undesirable to the consumer, whose interests we may not disregard."

In referring to the rates it was prescribing, the Commission said it was "according such weight to distance as seemed to us to be fair and reasonable." (R. 195.) It concluded by saying (R. 195):

> "It is plain, therefore, that comparisons based on distance, especially as between Indiana and Illinois groups to particular destinations, cannot be accepted as controlling, but must be evaluated with the above facts in mind."

In Finding 7 the Commission stated:

> "Normally, there is severe competition in the marketing of coal in this destination territory between the mine operators in each of the origin groups, and between the respective Indiana, Illinois, and western Kentucky groups, *and such competition has been and*

* To the twelve representative northern Illinois destinations used by the Commission, the average distance from Brazil is 256 miles, and from Springfield is 225 miles, a difference of 31 miles. For an average difference in distance between Brazil and Linton of 37 miles, appellants have consistently contended for a differential of 10 cents, which the Commission prescribed (R. 220).

> *should continue to be given important consideration* in the maintenance of the differentially related and finely balanced rate structure on this coal which is required to meet the needs of the consuming public, the mine operators, and the carriers concerned." (R. 207. Italics added.)

It may be helpful for the Court to have before it this statement made by the Commission in *Appalachian Power Co. v. N. & W. Ry. Co.*, 144 I. C. C. 333, 342:

> "It is a generally accepted practice to maintain coal rates on group bases on the theory, often vigorously supported by both operators and consumers, that such an adjustment gives consumers an opportunity to purchase coal in competitive markets, and enables farther distant mines to compete at the various points of consumption with mines which are nearer to such points. *The establishment of distance rates would tend to localize the source of supply of the consumers, destroy to a large extent the existing competition, and probably have an important influence on the cost of coal.*"

See also *Iron Ore Rate Cases*, 41 I. C. C. 181, 214; *Passenger Fares, District of Columbia, Nearby Virginia*, 256 I. C. C. 769, 781.

Appellants ask this Court to hold that the Commission must prescribe a parity of rates to Rockford from Brazil and Springfield.* That is not the function of this Court and this Court must under the law reject appellants' contention. The Commission has taken an approach to this case and has engaged in certain reasoning and has pursued a certain method of determining upon reasonable, non-discriminatory, and non-prejudicial rates. Appel-

* The relation of the rates from Brazil and Springfield to Rockford can not be of much importance to the Milwaukee or the Indiana coal operators, for Springfield ships very little coal to these destinations. In 1941, Brazil shipped 116,511 tons to Rockford while Springfield shipped only 3,358 tons. In the first six months of 1942, the tonnage from Springfield was only 1.3 per cent of the tonnage from Brazil (R. 1677 (Ex. 4, Sec. VIII). See infra, p. 72.

lants ask this Court to substitute its judgment as to the rightness of this approach and reasoning for the judgment of the Commission. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-7. There can be no question here but that the Commission's order is supported by substantial evidence and rests upon a rational basis.

In *Hanna Furnace Corporation* v. *United States*, 53 F. Supp. 341, a three-judge court, in sustaining an order of the Commission, said (p. 344):

> " * * * the Supreme Court in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, * * *, said ' * * * Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable.' Vide also: *Interstate Commerce Comm.* v. *Union Pacific R. Co.*, 222 U. S. 541, * * *. In view of the investigations made by the Commission in the matters of concern here, the *'knowledge of conditions, of environment and of transportation relations' so acquired has additional weight.*
>
> "The rule is too well settled to admit of any doubt that a finding by the Commission, supported by substantial evidence, must be sustained." (Italics added.)

Appellants would have this Court hold that the Commission's approach, theory, and reasoning in this case are unlawful notwithstanding the fact that as shown heretofore in this brief, the Commission's decision is based on the approach, theory and reasoning advocated by appellants throughout the proceeding before the Commission.

Thus appellants' only quarrel with the decision is that it did not result in the rates and relationship they contended for. In *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586, this Court said:

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

Appellants now would have this Court say that the Commission did not give the factor of distance enough weight in prescribing these rates, but rather gave conditions other than distance, *e. g.*, competitive conditions, too much weight. This is clearly an administrative question as to which this Court may not properly substitute its judgment for that of the Commission. See *O'Keefe* v. *United States*, 240 U. S. 294, 303-4; *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 22-3; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 10-11; *Baltimore & O. R. Co.* v. *United States*, 65 F. Supp. 962, 966.

In *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 549-550, this Court said:

> "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been

approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive."

It should be pointed out that before the Commission the present appellants urged that distance should *not* be given undue consideration in prescribing coal rates in this territory. In its original brief before the Commission, which is embraced by the record on appeal, the Coal Trade Association of Indiana said:

> "The Commission has recognized for years that distance is not a controlling factor in determining the propriety of a group and differential adjustment. * * * We respectfully urge the Commission to * * * continue to consider the more important and broader aspects of competition, interests of the public and the rights of carriers to participate in the movement of traffic to a given destination territory; * * *." (Pp. 74, 104-5.)

And in its Reply to Exceptions to the Proposed Report of the Examiner:

> "We submit that the fact that as between one group in Illinois and one group in Indiana, to a particular point, the rate for the same distance is slightly less from the Illinois group than from the Indiana group, does not have any substantial meaning in a case of this type, any more than when the reverse is shown. *Group and differential rates are not made with such regard for distance. The whole of the rate structure*, intrastate and interstate, from the related groups must be considered *and not individual rates* from each point in each group to each destination. If these cases were to be decided with that meticulous regard for distance, the group and differential basis of making rates would have to be dis-

carded and rates made on purely mileage scales, which no party advocates, and which would be destructive of the coal industry in these States and injurious to the consumers of coal in this territory." (P. 28. Italics added.)

The Court should hold that in requiring the establishment of the relationships reflected by the rates shown as approved rates in its report, the Commission was acting upon substantial evidence and that its order rests upon a rational basis and is not arbitrary or capricious.

A word may be said about another of appellants' contentions. They say the Commission required an increase in the Milwaukee's rates from Brazil and Linton in order to keep in effect a low 7-cent differential between the Linton and Princeton groups, which differential the Commission did not find was lawful. This argument is unsound. The Commission referred to that differential and said that it "necessarily reflects itself in relatively higher rates from the nearer Indiana groups, as well as relatively lower rates from the more distant Indiana group or groups, than might otherwise be warranted." (R. 190.) The Commission said, however, that since that 7-cent differential "is of long standing, is in effect generally throughout the Northwest, and is not here sought to be changed, we do not feel warranted in approving its disturbance." (R. 190.) The Milwaukee says the Commission did not pass on the lawfulness of that 7-cent differential. That is incorrect, for Finding 19 in the report (R. 210) explicitly states that the approved rates and relationships in Appendix A will result in a "reasonable, non-discriminatory, and non-prejudicial adjustment." Further, throughout this case the Indiana producing interests themselves strongly defended this

very differential. There is clearly no warrant for the Milwaukee's charge that the Commission penalized shippers in the Brazil and Linton groups for the purpose of preserving a suspect differential between Linton and Princeton.

A final answer may be made to what seems to be appellants' principal objection to the Commission's order, namely, the Commission's having prescribed higher rates to Rockford and Beloit from Brazil than from Springfield for substantially equal distances. These are but two of the more than 77 destinations involved. To the 12 representative destinations the average distance from Springfield is 31 miles less than from Brazil. The average level of the prescribed rates, as measured by the two different scales of coal rates used by the Commission, is approximately the same from both groups (R. 220). Appellants contend that the existing rates from Springfield and Brazil to the destinations involved were on a parity. The record shows, however, that to the 12 representative destinations the average rates from Springfield were 14 cents less than from Brazil, while the prescribed rates average only 12 cents less than from Springfield (R. 220). As the Commission observed in its report, *there has been no fixed relation between those groups to this territory* (R. 176). The Milwaukee has admitted that "the Springfield, Illinois group is not an important factor in this destination territory." (Petition for Reconsideration, p. 13.) Appellees submit that appellants' contention, therefore, is without merit.

## CONCLUSION.

The rates on coal in this territory have been before the Commission a great many times over a period of many years. From at least as far back as 1915, in the *Illinois Coal Cases*, 32 I. C. C. 659, the Commission has continually been coping, as conditions changed and as the public interest required it, with the problem of achieving a proper and lawful basis of rates on this very important commodity.

The Commission has said that in this Illinois coal adjustment was "a rate situation which presents unusual difficulties." *Illinois Coal Traffic Bureau* v. *Ahnapee & W. Ry. Co.*, 204 I. C. C. 225, 241. It is fully as sensitive and competitive as the grain rate structure, the proper adjustment of which this Court said was "enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer." *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 548. Continuing, the Court said:

> "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure, only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants."

These appellees contend that the Commission had jurisdiction to make the order under attack, that the order is supported by substantial evidence and adequate findings of fact and is in every respect valid. Appellees ask this Court to affirm the decree of the lower court dismissing the complaints.

Respectfully submitted,

ERLE J. ZOLL, JR.,
Attorney for The Alton Railroad Company (Henry A. Gardner, Trustee), et al.,
Railroad Appellees.

CHARLES W. STADELL,
Attorney for Central Illinois District Coal Traffic Bureau and Illinois Coal Traffic Bureau,
Appellees.

Chicago, Illinois.
March, 1947.

## APPENDIX.

The Interstate Commerce Act, U. S. C. Title 49, provides:

Section 1(5) (a):

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 2:

> "If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Section 3(1):

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port,

port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 4(1):

"It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and

no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

Section 13(3):

"Whenever in any investigation under the provisions of this charter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title."

Section 13 (4):

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15 (1):

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the pro-

visions of this chapter, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15 (7):

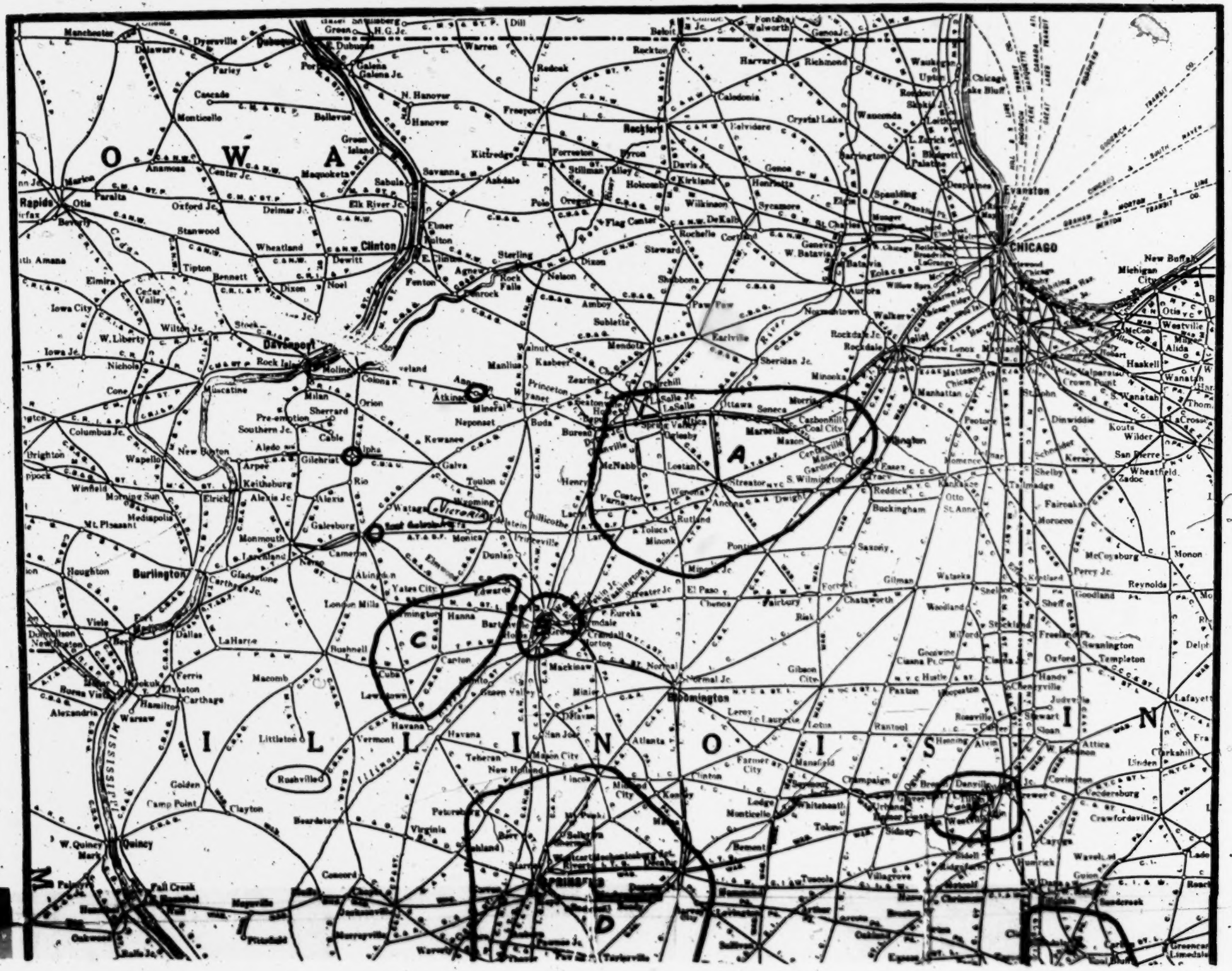
"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period

than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 15a (2):

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service"

COAL PRODUCING GROUPS IN ILLINOIS, INDIANA AND WESTERN KENTUCKY.



# SUPREME COURT OF THE UNITED STATES

No. 467.—October Term, 1946.

| | |
|---|---|
| Ayrshire Collieries Corporation, et al., and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellants, v. The United States of America, Interstate Commerce Commission, et al. | On Appeal from the District Court of the United States for the Southern District of Indiana. |

[April 28, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

Appellants filed complaints in the United States District Court for the Southern District of Indiana seeking a temporary stay, an interlocutory injunction and a permanent injunction against the enforcement of an order of the Interstate Commerce Commission, dated July 9, 1945. This order had been entered in connection with findings by the Commission that certain railroad tariffs were unlawful and that other rates should be prescribed in lieu thereof. *Coal to Beloit, Wis., and Northern Illinois*, 263 I. C. C. 179.

The complaints requested that the court convene a specially constituted court of three judges, as required by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220, 28 U. S. C. § 47, to hear the motions "for a temporary or interlocutory injunction and for final hearing in this proceeding." Circuit Judge Evans and District Judge Igoe were then assigned to sit with District Judge Baltzell to hear and determine these applications, and the cases were consolidated for all purposes. The applications for a temporary stay and an interlocutory injunction were assigned for hearing on January 3, 1946. But on that day, it appearing that the Commission had

postponed the effective date of its order to April 8, 1946, the court ordered that "the hearing upon the petitioners' application for an interlocutory injunction and temporary stay heretofore assigned and set for January 3, 1946, be and the same hereby is, continued to the day of final hearing herein and that said final hearing shall be had on March 25, 1946 . . ." The Commission made a further postponement of the effective date of its order to July 8, 1946, in order that the carriers subject to the order might avoid the necessity of preparing and filing new tariffs prior to the termination of the court proceeding. It also appeared that the illness of Judge Baltzell made it impossible for the court to convene as scheduled on March 25. And so the court reassigned the case for trial on April 22, with Judge Baltzell being replaced by Circuit Judge Major.

Argument was held on April 22 before Circuit Judges Evans and Major and District Judge Igoe at the "final hearing upon the plaintiffs' petitions for a permanent injunction." On June 5, 1946, findings of fact and conclusions of law were filed and entered under the signatures of Judges Major and Igoe; the Commission's order was sustained in all respects and a judgment was entered dismissing the complaints. The following notation was made in the margin of the findings of fact and conclusions of law: "Judge Evan A. Evans became ill subsequent to the hearing of these causes and he is and has been unable to participate in a determination thereof. The findings of fact, conclusions of law and judgment have therefore been entered by the remaining judges of such court."

The case was brought here on direct appeal.[1] We are of the opinion that the District Court's judgment was void, only two of the three judges having participated in the determination of the case. We accordingly do not

[1] Urgent Dificiencies Act of October 22, 1913, 38 Stat. 208, 219, 220, 28 U. S. C. §§ 45 and 47a; Judicial Code § 238, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

reach the issues involving the Commission's authority and the merits of its order, issues that have been argued at length before us.

The applicable provisions of the Urgent Deficiencies Act, 38 Stat. 220, 28 U. S. C. § 47, state: ". . . No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. . . . *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, . . . allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days . . . and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. . . ."

The requirement that three judges hear and determine suits to enjoin or set aside Interstate Commerce Commission orders had its origin in the provisions of the Expediting Act of February 11, 1903, 32 Stat. 823. That Act required three circuit judges, or two circuit judges and a district judge, to hear cases brought by the United States to enforce the antitrust and commerce laws. This

feature was then extended by the Hepburn Act of 1906, 34 Stat. 584, 592, to all suits brought to enforce or enjoin any order of the Interstate Commerce Commission, "including the hearing on an application for a preliminary injunction." The Act of June 18, 1910, 36 Stat. 539, created the Commerce Court and vested in it jurisdiction over suits to enjoin Commission orders; that court was composed of five judges, four of them constituting a quorum and at least three being required to concur in all decisions. Finally, the Urgent Deficiencies Act of 1913 transferred this jurisdiction to three-judge district courts, as detailed above. *United States* v. *Griffin*, 303 U. S. 226, 232–233.

The policy of requiring the deliberation of three judges in suits to enjoin the enforcement of Interstate Commerce Commission orders is thus a well-established one. It is grounded in the legislative desire to guard against ill-considered action by a single judge in the important and complex situations frequently presented by Commission orders. Such matters are deemed to warrant the full deliberation which a court of three judges is likely to secure.

This requirement, of course, is necessarily technical. It is not a broad social measure to be construed with liberality. It is a technical rule of procedure to be applied as such. See *Phillips* v. *United States*, 312 U. S. 246, 250–251. While due consideration must be given to the statutory policy of expediting the disposition of applications to enjoin the enforcement of Commission orders, the plain language of the Urgent Deficiencies Act compels strict adherence to the command that such applications "shall be heard and determined by three judges, of whom at least one shall be a circuit judge." And we must insist upon obedience to that legislative will even though the disposition of some applications may thereby be delayed.

When the framers of the Urgent Deficiencies Act declared that these applications "shall be heard and determined by three judges," we assume that they meant exactly what they said. The requirement that three judges hear and determine an application means that they must adjudicate the issues of law and fact which are presented by the case, a function which implies that they must weigh the arguments and testimony offered by both sides and vote either to grant or deny the relief sought by the moving party.[2] In addition, "Compliance with the statute requires the assent of the three judges given after the application is made evidenced by their signatures or an announcement in open court with three judges sitting followed by a formal order tested as they direct." *Cumberland Tel. Co.* v. *Public Service Commission*, 260 U. S. 212,

[2] In *State of Ohio* v. *United States*, 6 F. Supp. 386, affirmed, 292 U. S. 498, a case under the Urgent Deficiencies Act was argued before a court of three judges, all of whom participated in the discussions leading to a determination of the case. One of the judges died before the decision was announced. An opinion written by the judge who died was found among his papers after his death and was published as the opinion of the court, concurred in by the other two judges. The opinion had been written pursuant to an arrangement made at a prior conference of the three judges. The findings of fact and conclusions of law, which were filed some time after the opinion, were signed only by the two surviving judges. The matter, however, was not raised by the parties on appeal and was not considered or decided by this Court. The mere fact that the case was entertained by this Court is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354–355; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170.

Cf. *Frellsen & Co.* v. *Crandell*, 217 U. S. 71, where this Court, after Mr. Justice Brewer's death, adopted as its opinion one previously written by him.

218. All three judges, in other words, must fully perform the judicial function.[3] See *Dohany* v. *Rogers*, 281 U. S. 362, 369–370.

It is significant that this Act makes no provision for a quorum of less than three judges. Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases.[4] 28 U. S. C. § 212. The absence of such a quorum provision as to three-judge district courts is a strong corroborating indication that participation by all three judges is necessary to render a valid decision. The Act provides, it is true, that a decision may be reached by a three-judge court if a "majority of said three judges" concur. But that means only that the decision of the three judges need not be unanimous; it does not imply that two judges alone may hear and determine the case.

Moreover, we cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the

[3] In *James* v. *Clements*, 217 F. 51, a case had been argued and submitted to a three-judge circuit court of appeals and a decision rendered by a divided vote. A petition for rehearing had been filed and the court had decided that the prior decision was erroneous and that the opposite result should be announced without further briefs or argument. But before an order to that effect could be promulgated, one of the judges died. Since the other two judges were divided in their views, the case was restored for argument before a full bench of three judges. See also *Ryan* v. *Pennsylvania Public Utility Commission*, 44 F. Supp. 912, 914.

[4] But see 32 Stat. 823, as amended by 58 Stat. 272, 15 U. S. C. § 29, which provides that the senior circuit judge and the two circuit judges next in order of seniority shall "hear and determine" appeals from district court judgments in antitrust cases where this Court is unable to consider the appeals because of a lack of a quorum. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416.

third judge. And should the latter have publicly indicated an opinion differing from that of his colleagues, his position might be helpful to the litigants and to this Court if the case were appealed.

It is readily apparent that this statutory requirement has not been met in this case. While all three judges of the specially constituted court heard the oral argument, only two of them participated in the determination of the case. The findings of fact, the conclusions of law and the judgment were all entered without the approval, concurrence or dissent of the third judge. He thus missed the very essence of the judicial function in this case—the actual adjudication of the issues of law and fact. All that we have here is an adjudication by two judges. But under the statute it is not enough that there be an adjudication by two judges. They lack any statutory authority to hear and determine an application to enjoin the enforcement of a Commission order. Any action of theirs in granting or denying such an application is as void as similar action by a single judge. See *Cumberland Tel. Co.* v. *Public Service Commission, supra*, 218–219; *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 16.

It is suggested, however, that the three-judge requirement applies only to applications for interlocutory injunctions against the enforcement of Interstate Commerce Commission orders; and since the decision in this case was one denying a permanent injunction, no complaint can be made that the decision was rendered by less than three judges. Reference is made in this respect to § 266 of the Judicial Code, 28 U. S. C. § 380, which deals with injunctions against the enforcement of state statutes or state administrative orders on the ground of unconstitutionality of the statute involved. Prior to 1925, that section indicated that a three-judge court was necessary only to pass upon applications for interlocutory injunctions. A single judge had jurisdiction to hear the cause on final hearing

and to grant or deny a permanent injunction, thereby permitting him to reconsider and decide questions already passed upon by the three judges on the application for an interlocutory injunction. To end that anomalous situation, an amendment was added by the Act of February 13, 1925, 43 Stat. 938, to the effect that "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court." The problem then arose as to whether the words "such suit" in this amendment referred only to a suit in which an interlocutory injunction was in fact sought or to a suit in which it might have been, but was not, requested. A series of decisions by this Court has made it clear that the former interpretation is the correct one. A three-judge court must be convened for final hearings on applications for permanent injunctions against the enforcement of state statutes only where an interlocutory injunction has been sought and pressed to a hearing. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *Smith* v. *Wilson*, 273 U. S. 388; *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U. S. 67; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419. Where an interlocutory injunction is not sought and pressed, a single judge may hear and determine the application for a permanent injunction.

By analogy, it is claimed that the same rule should obtain under the Urgent Deficiencies Act, that a three-judge court should be necessary for final hearings on applications for permanent injunctions only where interlocutory injunctions have been sought and pressed. While it is admitted that an interlocutory injunction was sought in this case, the argument is made that the application was not pressed to a hearing, the need for such temporary relief having been eliminated by the postponement of the effective date of the Commission order. The whole emphasis of the Act, like that of § 266 of the Judicial Code, is said to be directed toward the prevention of

improvident issuance of interlocutory injunctions or restraining orders. Since there was no such danger in this case, the conclusion is reached that the underlying reason for the convening of a three-judge district court is absent here.

The answer to this argument is to be found in the clear language of the Act itself. It provides simply: "and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." Unlike § 266 of the Judicial Code, there is no reference here to "such suit"—to a suit where an interlocutory injunction is sought and pressed. Rather there is an unambiguous reference to the final hearing of "any suit" brought to enjoin the enforcement of a Commission order. That can only mean any suit seeking permanent relief, regardless of whether interlocutory relief is also requested. And since "the same requirement as to judges" is to apply to the final hearing of any suit, three judges must hear and determine the matter.

In addition, this portion of the Urgent Deficiencies Act was part of the original enactment and was not added to meet a problem like that which arose under § 266 of the Judicial Code. It was drawn against a background of prior statutes which provided for injunctive relief against the enforcement of Commission orders without regard to the presence of a request for temporary relief. The Hepburn Act required a three-judge court for "all" suits brought to enjoin a Commission order, "including the hearing on an application for a preliminary injunction,"—a clear indication that a three-judge court was also necessary where only permanent relief was sought. And the statute which created the Commerce Court, from which the district courts inherited their jurisdiction in this instance, referred to "cases" brought to enjoin or set aside Com-

mission orders, making no distinction as to those in which only permanent relief was sought. We can only conclude that the framers of the Urgent Deficiencies Act meant to require a three-judge court in any suit brought to enjoin the enforcement of a Commission order, including a suit where an interlocutory injunction is not sought and pressed to a hearing.

Time and again this Court has referred to the three-judge court requirement under this Act without making the distinction which has been made under § 266 of the Judicial Code. *Lambert Co.* v. *Baltimore & Ohio R. Co.*, 258 U. S. 377, 381–382; *Baltimore & Ohio R. Co.* v. *United States*, 279 U. S. 781, 784–785; *United States* v. *Griffin*, *supra*, 232–233. Indeed, without passing upon the precise problem, this Court has affirmed judgments of three-judge district courts which had granted permanent injunctions in cases where no interlocutory injunctions had been sought or pressed. See, *e. g.*, *United States* v. *Idaho*, 298 U. S. 105. And see *Hudson & Manhattan R. Co.* v. *United States*, 28 F. Supp. 137, 140.

The language and background of the Act, which have been augmented by the consistent understanding of this Court,[5] thus combine to require the use of a three-judge

[5] The same understanding, that the Urgent Deficiencies Act requires three judges for all applications to enjoin Commission orders while § 266 of the Judicial Code requires a three-judge court only for applications for interlocutory injunctions, is shown in the remarks of Mr. Justice Van Devanter at the Hearing before the Subcommittee of the Senate Committee on the Judiciary on S. 2060 and S. 2061, 68th Cong., 1st Sess., p. 33 (S. 2060 later became the Act of February 13, 1925):

"Section 238 as amended and reenacted in the bill would permit cases falling within four particular classes, and those only, to come from the district courts directly to the Supreme Court. The first and fourth classes are confined to antitrust and interstate commerce cases covered by the second section of the expedition act of February 11, 1903, and the provision in the act of October 22, 1913, respecting the

district court in all cases in which a permanent or interlocutory injunction is sought against the enforcement of a Commission order. It matters not in a particular case whether an interlocutory injunction is requested or whether, if such relief is asked, the application is pressed to a hearing. This Act seeks to guard against more than an improvident issuance of interlocutory injunctions by single judges; it also seeks to prevent single judges from issuing permanent injunctions.[6] To that end, Congress has required the use of a three-judge court and we are bound to carry out the letter and the spirit of that requirement. That two judges might, in a particular instance, give the same protection against single-judge action as three judges does not justify ignoring or relaxing the plain requirement that three judges hear and determine all applications to enjoin the enforcement of Commission orders. If such an amendment to the Act is to be made, it must be made by Congress rather than by this Court.

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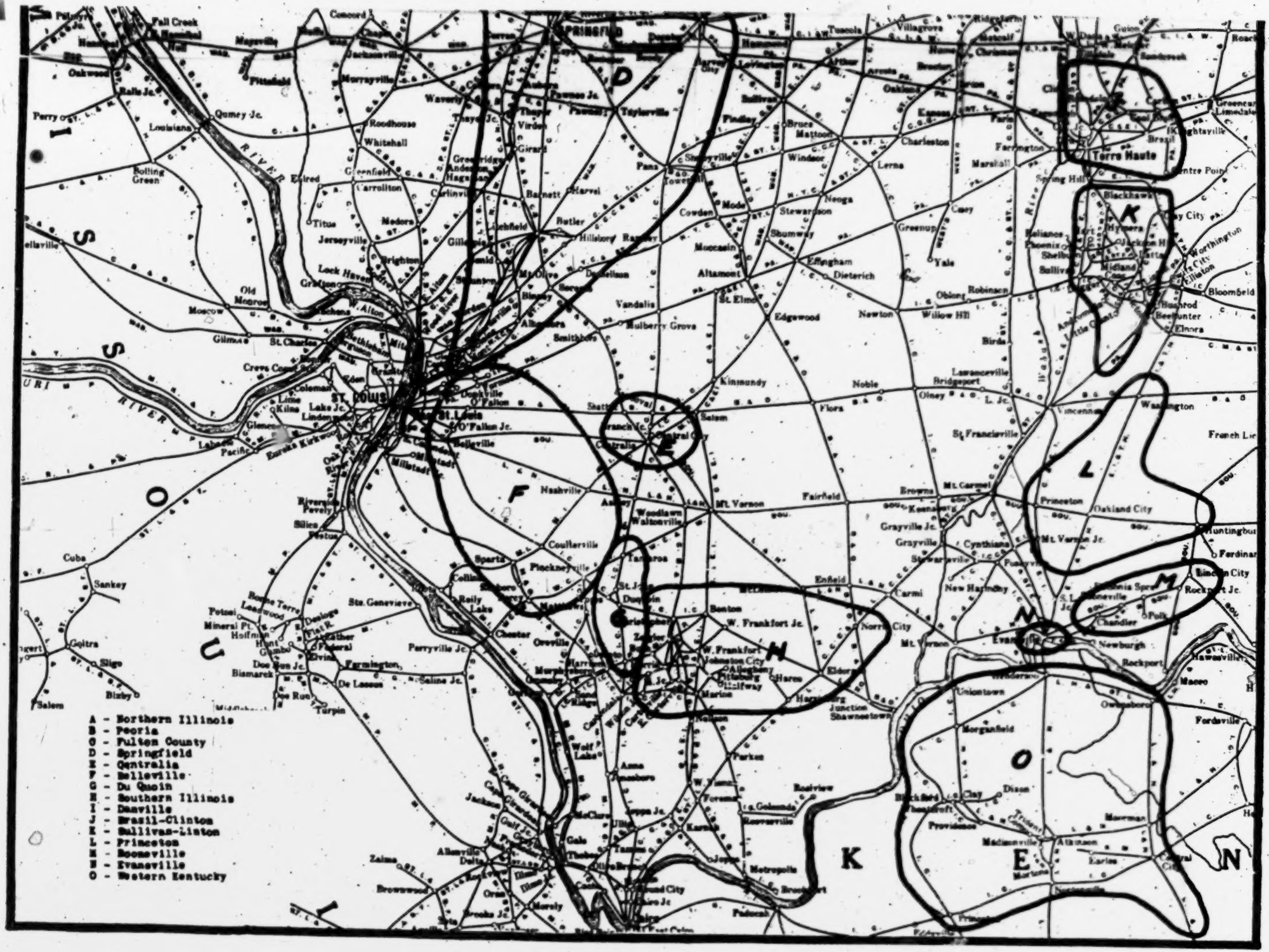
enforcement, suspension, etc., of orders of the Interstate Commerce Commission. These cases are heard in the district court by three judges, one of whom must be a circuit judge. This and the character of the cases make it suggest that they should go directly to the Supreme Court rather than through the circuit courts of appeals. The third class is confined to cases wherein the enforcement of a State statute or of an order of a State board or commission is suspended by an interlocutory injunction. Applications for such injunctions are heard in the district court by three judges, one being a circuit judge. These injunctions now go directly to the Supreme Court for review, and the bill continues that procedure. . . ."

See also Mr. Justice Van Devanter's remarks at Hearing before House Committee on the Judiciary on H. R. 8206, 68th Cong., 2d Sess., p. 15.

[6] See also 50 Stat. 752, 28 U. S. C. § 380a, providing that no interlocutory or permanent injunction restraining the enforcement of, or setting aside, any Act of Congress on the ground of unconstitutionality shall be issued by a district court, unless the application shall be presented to a circuit or district judge and shall be heard and determined by three judges, of whom at least one shall be a circuit judge.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Since the judgment entered by two judges in this case was void and without statutory authority, we have no alternative but to vacate the judgment and dismiss the appeal. Appellants will be free, of course, to suggest that the District Court be reconvened in accordance with the Act so that three judges may hear and determine the application to enjoin the Commission order in issue.

*So ordered.*

MR. JUSTICE RUTLEDGE dissents.